2006

Bud Allen v. Utah Public Servie Commission and Questar Gas : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BUD ALLEN, et al., Petitioners, v. UTAH PUBLIC SERVICE COMMISSION and QUESTAR GAS COMPANY, Respondents.	Case No. 20060279-SC (consolidated) Agency Docket Nos. 04-057-04, 04-057-09, 04-057-11, 04-057-13, 05-057-01

BRIEF OF RESPONDENT QUESTAR GAS COMPANY

Petition for Review of a Final Report and Order of the Public Service Commission of Utah

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ADDITIONAL PARTIES

In addition to Questar Gas Company ("Questar Gas" or the "Company"), additional parties to the Public Service Commission of Utah (the "Commission") proceeding below were the Utah Division of Public Utilities (the "Division") and the Utah Committee of Consumer Services (the "Committee"). Petitioners did not participate as parties to the proceeding below.[1] The Commission is a party to this appeal.

[1] Although Questar Gas recognizes the Court's typical preference to refer to parties by name, for convenience in this case Questar Gas will refer to the 55 petitioners collectively as "Petitioners," except where the identification of a particular petitioner is appropriate. Roger Ball and Claire Geddes are the only Petitioners in Case No. 20060280-SC consolidated in this appeal. They are the lead Petitioners in Case No. 20060279-SC. They originally filed form statements in support for their Request to Intervene in the proceeding before the Commission from most of the 53 other Petitioners and others. Record ("R.") 337-678. After the Commission denied them intervention, they apparently recruited the other Petitioners to join them in seeking reconsideration of the order of the Commission. R. 1156. Therefore, Questar Gas will sometimes refer to Mr. Ball and Ms. Geddes separately from the other Petitioners. Questar Gas accepts the identification of the Petitioners set forth in the List of Parties on page 2 of Petitioners' Brief.

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I. STATEMENT OF JURISDICTION

The Court does not have jurisdiction in this case because Petitioners lacked standing to seek reconsideration of the orders of the Commission for which they seek review and because Petitioners failed to preserve any standing they otherwise may have had. Utah Code Ann. §§ 54-7-15; 63-46b-12; 63-46b-16, *Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶¶ 29-30, 31 P.3d 1147

II. STATEMENT OF ISSUES

Issue 1: Does the Court have jurisdiction to consider this appeal given that Petitioners lacked standing to seek rehearing or reconsideration of the orders under review in these consolidated appeals. Further, should Roger Ball's and Claire Geddes' appeal of order denying them intervention be dismissed because they did not adequately seek rehearing or reconsideration and have not briefed the issue? The issues raised are questions of law, but also involve questions of fact relating to Petitioners' alleged status as Questar Corporation shareholders[2] and their actions in demonstrating and preserving any standing they may otherwise have had.[3] The questions regarding Petitioners' standing were preserved for appeal by the Response of Questar Gas Company in Opposition to Requests for Reconsideration of Report and Order and Request for Reconsideration of Order on Request to Intervene. *See* R. 1156.

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[2] Questar Corporation is the parent and sole shareholder of Questar Gas. The common stock of Questar Corporation is publicly-traded on the New York Stock Exchange.

[3] *See, e.g., Midvale City Corp. v. Haltom*, 2003 UT 26, ¶ 12, 73 P.3d 334; *S & G, Inc. v. Morgan*, 797 P.2d 1085, 1087-88 (Utah 1990); *Redwood Gym v. Salt Lake County Comm'n*, 624 P.2d 1138, 1145 (Utah 1981).

Issue 2: Did the Commission's conclusion in a 1999 general rate case found in the *2004 Order*[4] and the *Clarification Order*[5] that Questar Gas had not met its burden to demonstrate that costs associated with processing coal-bed methane were prudently incurred for the period June 1999 through May 2004 bar the Commission from considering the prudence of costs incurred prospectively starting in 2005 in a new and separate docket, and, if so, were Petitioners substantially prejudiced? *See* Utah Code Ann. § 63-46b-16(4)(d). For aspects of this issue dealing with the Commission's ratemaking function, the issue is governed by the abuse of discretion standard. For aspects of this issue dealing with res judicata, this is an issue of law governed by the correction of error standard.[6] This issue roughly encompasses Petitioners' issues 1 and 2, and was not preserved on appeal by Petitioners because no party with standing sought rehearing or reconsideration of the final order at issue in this case. However, assuming for purposes of argument that Petitioners had standing, Questar Gas accepts Petitioners' statement that they raised these issues in their request for rehearing below.[7]

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[4] Order, Docket Nos. 98-057-12, 99-057-20, 01-057-14 and 57-05 (Utah PSC Aug. 30, 2004) ("*2004 Order*") at 18. Addendum 9 to Petitioners' Brief. The *2004 Order* is attached as Addendum 7.

[5] Order on Request for Reconsideration or Clarification, Docket Nos. 98-057-12, 99-057-20, 01-057-14 and 03-057-05 (Utah PSC Oct. 20, 2004) ("*Clarification Order*") at 3. The *Clarification Order* is attached as Addendum 8.

[6] *See, e.g.*, *WWC Holding Co. v. Public Serv. Comm'n*, 2002 UT 23, ¶¶ 7-8, 44 P.3d 714; *Esquivel v. Labor Comm'n*, 2000 UT 66, ¶¶ 13-16, 7 P.3d 777; *Anderson v. Public Serv. Comm'n*, 839 P.2d 822, 824 (Utah 1992).

[7] *See* Petitioners' Brief ("Br.") 12-15. This statement also applies to Issues 4 and 5.

Issue 3: Was the Commission's finding of prudence and approval of a negotiated settlement among all parties to the proceeding below supported by substantial, competent evidence, and, if not, were Petitioners substantially prejudiced? *See* Utah Code Ann. § 63-46b-16(4)(g). This is a mixed question of fact and law governed by the substantial evidence standard. *See Elks Lodges No. 719 & No. 2021 v. Dept. of Alcohol. Bev. Control Comm'n*, 905 P.2d 1189, 1193 (Utah 1995). Petitioners fail to identify substantial evidence review as having any bearing on this appeal, instead inappropriately asking the Court to apply a correction of error standard to every aspect of review of the Commission's order. Likewise, Petitioners fail to make any attempt to marshal the evidence in support of the Commission's order. Thus, Petitioners have failed to preserve on appeal any factual objections to the sufficiency of the evidence, and the Court should assume the sufficiency of that evidence.[8] With respect to claims that the evidence was incompetent, Petitioners do not identify this as an issue in their appeal. In any event, the issue was not preserved on appeal by Petitioners because no party with standing sought rehearing or reconsideration of the final order at issue in this case. However, Questar Gas acknowledges that Petitioners made the same argument in their request for rehearing below. R. 1145 at 54-60.

Issue 4: Did the Commission provide due process in conducting its proceedings below and in reaching its final determination, and, if not, were Petitioners prejudiced?

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[8] *See, e.g., Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177; *Tanner v. Carter*, 2001 UT 18, ¶ 17, 20 P.3d 332.

See Utah Code Ann. § 63-46b-16(4)(e). This is an issue of law governed by the correction of error standard.[9] This issue roughly corresponds to Petitioners' issues.

Issue 5: Was the Commission authorized to approve a settlement involving an affiliate transaction? This issue is governed by the abuse of discretion standard because it involves statutory language indicating legislative intent to delegate interpretation to the Commission.[10] This issue roughly corresponds to Petitioners' issues 3 and 4.

III. DETERMINATIVE PROVISIONS

Statutes that are or may be determinative or of central importance to this appeal are as follows, and are attached as Addendum 1: Utah Code Ann. §§ 54-4-4, 54-4-26, 54-7-1, 54-7-13, 54-7-15, 63-46b-14, and 63-46b-16.

IV. STATEMENT OF CASE[11]

A. Nature of the Case

This appeal is a review of a final order ("*2006 Order*"), attached as Addendum 2,[12] issued by the Commission on January 6, 2006, approving the terms of the Gas Management Cost Stipulation ("Stipulation") entered into among Questar Gas, the Division, and the Committee, all of the parties to the proceeding below. The Stipulation was entered following extensive examination of the issues surrounding the ongoing

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[9] *See, e.g., WWC Holding Co.*, 2001 UT 23 at ¶ 8, 44 P.3d at 718; *Anderson*, 839 P.2d at 824.

[10] *Morton Int'l v. Auditing Division, Utah Tax Comm'n*, 814 P.2d 581, 588-89 (Utah 1991).

[11] Questar Gas does not accept Petitioners' argumentative and inaccurate statement of the case, and therefore provides its own statement.

[12] Report and Order, Docket No.04-057-04, 04-057-11, 04-057-13, 04-057-09, 05-057-01 (Utah PSC Jan. 6. 2006).

production of natural gas extracted from coal seams ("coal-bed methane") located in the Ferron area of Emery County, Utah. This type of natural gas has been produced in increasing quantities in recent years by energy producers unaffiliated with Questar Gas, and is an increasingly large component of the gas supply purchased by Questar Gas to meet the needs of its customers. Although it is a high-quality and (in relative terms) inexpensive source of gas, it can cause potential safety concerns because it has a lower heat content that is not compatible with the appliance settings of many older appliances of Questar Gas customers.

Throughout the proceeding below, the parties and the Commission examined the best method of addressing the existence of coal-bed methane in close proximity to the Company's system.[13] The regulators and Questar Gas concluded that it was best for Questar Gas to continue to purchase coal-bed methane and that the coal-bed methane should continue to be processed at a plant located in Castle Valley, Utah ("CO_2 Removal Plant"),[14] to remove carbon dioxide ("CO_2") during the remaining three years of an expected ten-year transition period. The 10-year transition period was planned in 1998 to allow customers a reasonable period of time to replace worn out appliances or to adjust existing appliances during routine inspection and maintenance visits ("Green Sticker

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[13] This gas is otherwise usable by nearly all other natural gas consumers in the United States and meets the quality standards of the interstate pipeline grid. R. 235 at 11.

[14] The plant is owned by Questar Transportation Service Company ("Questar Transportation"), a subsidiary of Questar Pipeline Company ("Questar Pipeline"). Questar Pipeline is the affiliate of Questar Gas that transports natural gas in interstate commerce for delivery to customers, including Questar Gas. Questar Pipeline is regulated by the Federal Energy Regulatory Commission ("FERC").

Program") so that all appliances would operate safely with lower-heat-content gas without the incurrence by customers of unnecessary costs.[15]

The dispute now before the Court is whether there is legal and factual support for the conclusion reached by the Commission and the parties on a prudent course of action for Questar Gas to pursue in addressing the increasing presence of coal-bed methane near its system, and on the grant of partial rate recovery for that course of action. According to Petitioners, the Commission is precluded from granting cost recovery for any option using the CO_2 Removal Plant even if it is the lowest-cost and most-reliable option because the Commission previously denied recovery for the costs of the Plant incurred during a different time period under different circumstances. This flies in the face of the facts that the Commission specifically ruled that it would institute a proceeding to deal with this issue prospectively (*2004 Order* at 38-39), and that Questar Gas could seek to recover CO_2 removal costs in a future proceeding. *Clarification Order* at 4-5.

B. Course of Proceedings

1. Proceedings Culminating in the Commission's *2004 Order*

Petitioners' Brief is technically correct in noting that there have been a number of Commission dockets associated with coal-bed methane in recent years. Br. 16. The

[15] R. 235 at 9-10. During the transition period, Questar Gas is using CO_2 removal to manage the heat content of its gas supply in the narrow range of overlap between the old and new heat-content specification thus ensuring compatibility between the Company's gas supplies and its customers' appliance settings, whether set at the old or new specification. R. 246 at 37.

suggestion that the number of dockets has been confusing, however, is misleading.[16] The lead Petitioners, Mr. Ball and Ms. Geddes, have a thorough knowledge of the Commission's docketing system, and Mr. Ball was intimately involved in all proceedings related to coal-bed methane in his prior employment as director of the Committee's staff. There have only been three proceedings in which the question of rate recovery for costs incurred in processing coal-bed methane has been substantively addressed.

First, in late 1998 in Docket No. 98-057-12, Questar Gas requested authorization to include CO_2 removal costs in its 191 Account. The Commission issued a final order in December 1999 that CO_2 removal costs could not be recovered through the 191 Account because they were not appropriate pass-through costs under Utah Code Ann. § 54-7-12(3). The Commission stated that such costs could only be recovered by the Company through a general or abbreviated rate case.[17]

In October 2001, this Court reversed the *1999 Order* in the *2001 Decision*, holding that the 191 Account was a separate rate-changing mechanism not tied to the pass-

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[16] Br. 88-91. The number of additional dockets is due to the gas cost pass-through proceedings the Company files as a matter of course pursuant to its 191 Gas Cost Balancing Account ("191 Account" or "pass-through account"). If the Company is to receive cost recovery for any gas processing charges, these charges must be included in pass-through filings. These proceedings true-up the Company's gas commodity related costs two or more times per year. They would proceed regardless of whether or not the Company were dealing with coal-bed methane, and their docket numbers have simply been consolidated with the docket numbers of the cases addressing coal-bed methane. The coal-bed methane processing charges are recovered in these pass-through proceedings pursuant to this Court's decision in *Questar Gas Co. v. Public Serv. Comm'n*, 2001 UT 93, 34 P.3d 218 ("*2001 Decision*"), discussed below.

[17] Report and Order, Docket No. 98-057-12 (Utah PSC Dec. 3, 1999) ("*1999 Order*") at 3.

through statute and that the Commission was required to consider the Company's application according to previously established 191 Account procedures.

Second, in December 1999, Questar Gas filed a general rate case in Docket No. 99-057-20, seeking, among other things, rate recovery of CO_2 removal costs in response to the *1999 Order*. Before the parties put on all evidence or conducted full cross examination on this issue, Questar Gas and the Division filed a CO_2 Stipulation agreeing that $5 million (approximately 68 percent) of CO_2 removal costs could be included in rates each year for five years beginning in June 1999. They also agreed that if Questar Gas wished recovery of any CO_2 removal costs after May 2004, it would be required to seek further regulatory approval. In August 2000, the Commission issued its order approving the stipulation.[18]

The Committee sought review of the *2000 Order* by this Court, and, in August 2003, the Court reversed that order.[19] The Court held that the Commission could not allow rate recovery of the processing costs solely on the ground that they provided safe gas without finding them prudent. *2003 Decision* at ¶ 13.

Based on the fact that Docket No. 99-057-20 had ended in a stipulated settlement and the parties had not completed that portion of the presentation of their cases, following the Court's *2003 Decision*, Questar Gas sought an opportunity to marshal the evidence in

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[18] Report and Order, Docket No. 99-057-20 (Utah PSC Aug. 11, 2000) ("*2000 Order*"). (*See* Br. Addendum 5)

[19] *Committee of Consumer Services v. Public Serv. Comm'n*, 2003 UT 29, ¶ 16, 75 P.3d 481 ("*2003 Decision*").

support of a finding of prudence.[20] Contrary to Petitioners' assertion (Br. 40, 59), this did not involve the presentation of any new evidence; rather, it involved reviewing the evidence already on the record of the 1999 general rate case and making argument as to why such evidence supported (or did not support) rate recovery of CO_2 removal costs for the time period covered by that case as provided in the CO_2 Stipulation. After this Court denied an emergency petition by the Committee intended to stop any further Commission proceedings,[21] the parties marshaled the evidence and presented their arguments to the Commission. *2004 Order* at 13-14.

The order resulting from this process was the *2004 Order*, exhaustively (and often misleadingly) addressed in Petitioners' Brief. The Commission found, based on the record as it was developed in the 1998 and 1999 cases, that Questar Gas had not met its burden to demonstrate that the CO_2 removal costs were prudently incurred. *See id.* at 49. As a result, the Commission denied all rate recovery for the CO_2 removal costs under the CO_2 Stipulation, and Questar Gas returned to customers $29 million (including interest) recovered from June 1999 through May 2004 and removed these costs from rates going forward. R. 235 at 13. Contrary to Petitioners' suggestion, the Commission never found that CO_2 removal costs were in fact "imprudently" incurred.

Questar Gas sought reconsideration and clarification of the *2004 Order*. The Commission issued the *Clarification Order* on October 20, 2004. In the *Clarification*

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[20] Order, Docket Nos. 98-057-12, 99-057-20, 01-057-14, and 03-057-05 (Utah PSC Dec. 17, 2003) ("*2003 Order*"). (*See* Br. Addendum 7).

[21] *Committee of Consumer Services v. Public Serv. Comm'n*, Case No. 20040060-SC, Order Denying Petition for Extraordinary Relief (Utah March 22, 2004).

Order, the Commission stated that the *2004 Order* did not preclude Questar Gas from seeking recovery of CO_2 removal costs in other dockets. *Clarification Order* at 5.

Third, this proceeding, which is a consolidation of five dockets, was initiated based on the Commission's direction in the *2004 Order* that it would "address, in a separate docket, how to craft a long-term solution to the compatibility of customer appliances with natural gas containing coal-seam gas consistent with the utility's obligation to provide safe commodity and service to its customers." *2004 Order* at 38-39.

2. Proceedings Following the Period Covered by the *2004 Order.*

a. Pass-through dockets and the Commission-ordered investigation

Pursuant to its standard 191 Account practice, Questar Gas filed pass-through gas cost applications on May 5, 2004 in Docket No. 04-057-04, on September 17, 2004 in Docket No. 04-057-11, and on December 9, 2004 in Docket No. 04-057-13. R. 1-26, 45-69, 106-116. The requests for recovery of CO_2 removal costs in these applications served as placeholders for consideration by the Commission of CO_2 removal costs going forward. They are three of the five dockets in which the *2006 Order* now on appeal was issued.

The fourth docket, Docket No. 04-057-09, was opened by the Commission following the issuance of the *2004 Order* to address how to "craft a long-term solution to the compatibility of customer appliances with . . . coal-seam gas". *2004 Order* at 38-39. The Commission issued a notice of scheduling conference on September 8, 2004, "to set dates for technical conferences to discuss the long-term solution to Questar Gas

Company's gas quality." R. 41. In this Commission-initiated docket, a scheduling order established dates and subjects for a series of technical conferences to explore various aspects of the ongoing coal-bed methane issue. R. 235 at 16. The technical conferences commenced on October 13, 2004 and continued through January 19, 2005.[22]

In all, six publicly-noticed technical conferences were held, each lasting many hours, and each with vigorous discussion among the participants. R. 1144 at 17-24. The topic, as the Commission indicated in its *2004 Order*, was what to do about the coal-bed methane that was being produced in large and increasing quantities by producers unaffiliated with Questar Gas in close proximity to the Company's system. This gas had become an important, low-cost component of the Company's gas supplies. *Id.* at 36. Other participants questioned Questar Gas about its proposals for dealing with the heat-content compatibility issue and customers' current appliance settings, and provided their own proposals, input and direction on issues for which they felt further attention was warranted. *Id.* at 35-37. The participants addressed the issues in the context of the standards for establishing prudence and addressing potential affiliate conflicts set forth in the *2004 Order* and the *Clarification Order*.

Through the technical conferences, the Company's decision-making process for addressing current issues with coal-bed methane was transparent and open for review and input by all interested participants, including the Committee and its staff under Mr. Ball's

[22] R. 235 at 16-17. Participants included the Committee with Mr. Ball as its staff director, the Division, the Commission and its staff, consumer representatives, industrial customers, various heating and ventilation contractors, several state and local building inspectors, and other interested persons. R. 1150 at 7-8.

direction, each step of the way throughout the technical conferences.[23] Questar Gas actively and repeatedly solicited input by the other participants on how to identify and implement the best long-term solution to coal-bed methane. *Id.* at 37.

b. Proceedings in consolidated dockets, including Docket No. 05-057-01

In light of the conclusions reached in the collaborative technical conferences on the most prudent course to follow in handling coal-bed methane, Questar Gas filed a verified application in a consolidated docket, including the foregoing dockets and the fifth docket in which the *2006 Order* was issued, Docket No. 05-057-01, on January 31, 2005, seeking recovery of its costs incurred for management of gas quality. R. 129-213. All further proceedings were captioned under the five consolidated docket numbers. The publicly-filed, verified application included a thorough review of the subjects discussed and conclusions reached in the six technical conferences and included exhibits consisting of essentially every document that had been reviewed in the technical conferences.[24]

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[23] R. 1144 at 37. Members of the Committee's staff were present for every one of the technical conferences and actively participated in the discussion. R. 1144 at 17. Mr. Ball, himself, was present for all or most of the technical conferences. He also participated in other meetings directly between Questar Gas and Committee staff on these issues during this time period. R. 679 at 2-3; R. 680 at 6; R. 681 at 6. He was fully aware that the Commission and parties were considering the appropriateness of continued CO_2 removal **and attendant rate recovery** for that removal (R. 1150 at 7), leaving no basis for Petitioners to complain that the purpose of Docket No. 04-057-09 was somehow masked from their view or that they had no idea that settlement by the Committee was a possibility. Br. 88-91.

[24] The verified application set forth the Company's decision-making process on addressing coal-bed methane in the technical conferences (R. 130-216), contrary to Petitioners' representation that information from the technical conferences was not available to the public. Br. 52-53, 83 n. 24. Beyond that, the technical conferences were publicly-noticed meetings. R. 83, 118-122.

The Commission gave notice on February 22, 2005 of a conference to schedule further proceedings in the consolidated docket. R. 220. At that conference held on March 1, 2005, the parties agreed upon a schedule under which Questar Gas would file testimony on April 15 supporting the prudence of its ongoing gas management expenditures and the Division, Committee and any intervenor would file responsive testimony on August 15. Hearings were scheduled to commence on October 6, 2005. R. 230. Mr. Ball was intimately familiar with this contemplated schedule, and from the language of the Request to Intervene filed in these dockets on November 17, 2005, it appears that Ms. Geddes was also.[25]

As contemplated by the established schedule, Questar Gas filed testimony of six witnesses, consisting of 206 pages of testimony and 45 exhibits, in support of its verified application on April 15, 2005. R. 234-307. The Division and Committee retained independent consultants and served over 400 discovery requests that ultimately resulted in the production of nearly 1,000 pages of studies and information. R. 1144 at 36. An

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[25] R. 336 at 2-3 (Ms. Geddes and Mr. Ball represented that they "are extremely experienced and knowledgeable about utility and regulatory issues generally. . . . Moreover, they are both very knowledgeable about the specific dockets captioned above from a time even before Docket 98-057-T02 [the docket in which the heat-content specification in the Questar Gas tariff was lowered]. Ms. Geddes has provided a consistent voice for consumers throughout these entire proceedings. Mr. Ball has followed the proceedings from Questar's first briefing of Commission, Division and Committee staff in 1997 through the Technical Conference held on January 19[, 2005] and Questar's January application filing.")

As discussed in Section VI.D.2, below, this self-proclaimed knowledge and involvement is highly relevant because it demonstrates the complete inexcusability of Mr. Ball and Ms. Geddes' seeking intervention as late as they did. *See* Intervention Order, R. 1150, attached as Addendum 3, at 13-14. Mr. Ball and Ms. Geddes are clearly the lead Petitioners in this matter.

order rescheduling their testimony filing date to September 20, 2005 and the hearing to November 1, 2005 was issued September 6, 2005. R. 317.

On October 11, 2005, after extensive and difficult settlement discussions over the course of many months, at which not only the parties but others who expressed an interest participated in the matter (including industrial customers and others from the technical conferences), the parties filed the Stipulation. R. 322; R. 2297 at 15. On the same day, even though no public hearing is required for the approval of a settlement among all parties to a case (*see* Utah Code Ann. § 54-7-1(3)(e)(ii)(C)), the Commission gave notice of public hearings on approval of the Stipulation. R. 323.

The hearings were held on October 20 as scheduled. Each of the parties provided a witness in support of approval of the Stipulation. In addition, as provided in the Stipulation, the parties moved the Commission to take notice of information provided in the technical conferences and the Company's verified application and to admit into evidence the sworn testimony of Questar Gas filed on April 15 in support of approval of the Stipulation.[26] No one objected. The Commission asked questions regarding the motion and the Stipulation, which were answered by the witnesses. R. 2297. Two people appeared and offered sworn testimony at the public witness hearing scheduled at 4:30 p.m. on the same day. Their presence demonstrated that the Commission's notice

[26] The information provided in the technical conferences was largely incorporated into the verified application filed January 31, 2005 (R. 130) and the sworn testimony of Barrie L. McKay and Lawrence Conti filed April 15, 2005 (R. 235-82), essentially rendering moot the issue of whether taking administrative notice of the technical conferences was necessary. *See* R. 1144 at 32 n. 18.

was effective as to the public generally. At the conclusion of the public witness hearing, the Commission took the matter under advisement. R. 2299 at 16.

A number of days after the conclusion of proceedings, Mr. Ball and Ms. Geddes contacted the Commission, complaining that they were not aware of the hearing and requesting the opportunity to file statements. R. 1150 at 6-7. The Commission told them it would accept and consider their late statements. They filed affidavits on November 4, 2005. R. 328-30. Questar Gas filed a response on November 11. R. 335.

On November 17, 2005, four weeks after the proceeding was concluded, Mr. Ball and Ms. Geddes filed a Request to Intervene, containing essentially the same information and argument that was included in their affidavits. R. 336. The only excuse they offered for not intervening sooner was that they were not aware of the Stipulation and hearing on it, but they acknowledged they were well aware of the proceeding and its general schedule. R. 1150 at 6-7. In support of the Request to Intervene, Mr. Ball and Ms. Geddes prepared and filed form statements of support signed by a number of individuals or couples claiming to be customers of Questar Gas, among whom were most of the other 53 Petitioners.[27] Questar Gas, the Division and the Committee all filed responses in opposition to the Request to Intervene. R. 679-81. Mr. Ball and Ms. Geddes filed a reply to the oppositions. R. 685.

On January 6, 2006, the Commission issued the Intervention Order, denying the request of Mr. Ball and Ms. Geddes to intervene. R. 1150. On the same day, the

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[27] R. 337-678. A copy of two of these form statements are attached as Addendum 4.

Commission issued the *2006 Order* approving the Stipulation. R. 1144. Mr. Ball and Ms. Geddes (joined by the 53 other Petitioners) sought reconsideration of the *2006 Order* on February 6, 2006. R. 1156-59. On that same day, Mr. Ball and Ms. Geddes also separately sought reconsideration of the Intervention Order. R. 1162-63. On February 21, 2006, Questar Gas, the Division, and the Committee each filed a response in opposition to the petitions for reconsideration. R. 2151-53. The Commission did not act on the petitions, so they were deemed denied on February 27, 2006. *See* Utah Code Ann. § 54-7-15(2)(c). Petitioners filed their petitions for review in this Court on March 27, 2006. Questar filed motions to dismiss the petitions on May 2, 2006. Petitioners responded on May 26, 2006. The Court issued an order on June 5, 2006, deferring the motions until it considers the matter on full briefing and oral argument.

C. Disposition Below

In the *2006 Order*, after carefully reviewing the proceedings, considering the effect of the *2004 Order*, and reviewing the evidence, the Commission specifically concluded that "Questar Gas's use of the CO_2 Removal Plant from and after February 1, 2005 to manage the heat content of its gas supplies is prudent and that the partial recovery of costs provided in the Stipulation is reasonable and in the public interest." R. 1144 at 38. Based on this conclusion, the Commission approved and adopted the Stipulation allowing partial recovery of CO_2 removal costs for a period of three years.

In the Intervention Order, the Commission concluded that granting intervention to Mr. Ball and Ms. Geddes after the case had closed would impair the interest of justice and the orderly and prompt conduct of the proceeding (*see* Utah Code Ann. § 63-46b-

9(2)(b)) and that they had offered no reasonable excuse for their tardy intervention. R. 1150 at 6. In addition, the Commission found that their statements were unpersuasive. *Id.*

D. Statement of Facts

1. Introduction

The statement of facts section in Petitioners' Brief rarely cites the record (and the few times it does are only for procedural background) and is an argumentative and misleading attempt to draw the Court's focus onto questions surrounding the Company's handling of coal-bed methane at and before the time of the decision to build the CO_2 Removal Plant in 1998.[28] Petitioners attempt to misuse the Commission's unanswered questions from the *2004 Order* to cast Questar Gas in a negative light and distract from the real issue in the case.

In order to provide a broader context for the Court as it reviews the *2006 Order*, Questar Gas will provide a brief history of coal-bed methane in Utah, and how this gas fits into the natural gas supplies of the Company, of the region, and of the country at large. This broader context demonstrates the soundness of the Commission's decision in this case, by appropriately casting the issue as one of prudence in obtaining and managing gas supplies for the benefit of customers *today*.

[28] The misleading nature of Petitioners' statement of facts is demonstrated by comparing it with Sections I, III and V.B of the *2006 Order*. R. 1144 at 1-4, 8-26, 33-38.

2. Background of Natural Gas Use, Production and Regulation

"Natural gas" is the general term used to describe a variety of hydrocarbon molecules extracted from underground formations that include primarily methane, and, in some cases, smaller quantities of ethane, butane and propane. Various trace elements and impurities are found in natural gas. Some of these, such as hydrogen sulfide, can be deadly or cause corrosion or other equipment problems. R. 279 at 13. Natural gas is mixed with air and burned to produce heat or electricity. R. 246 at 7. In order for combustion to occur safely and efficiently, a correct ratio of air and natural gas is required. *Id.* If the correct ratio is not provided, problems such as "incomplete combustion" or "flame liftoff" might result, causing the production of carbon monoxide or the flame to extinguish, either of which can result in injury or death. R. at 12; R. 304 at 10. Different types of natural gas produced in different fields have different heating values and specific gravities, which together are important components of what is referred to herein as the "heat content" of natural gas. R. 246 at 18. In order for an appliance to operate properly, the orifice of the appliance and air mixture must be adjusted or sized based on the altitude at which the appliance is located and the expected heat content of the gas that will fuel the appliance.[29]

Given the need to manage the heat content of the gas so that it is compatible with customer appliances, to address gas that has excessive or insufficient heavier hydrocarbons such as propane and butane, to address trace elements, and to deal with

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[29] *Id.* at 8. An appliance orifice limits the flow of natural gas into an appliance's combustion chamber through a fixed or adjustable opening. R. 246 at 7-8.

inert gases such as CO_2 and nitrogen, almost all gas must be "processed" in one way or another before it can safely be burned by end-users. R. 246 at 20-22. Such processing is routinely considered a part of the costs a prudent utility must incur to provide safe, useable gas for its customers. *Id.* at 69.

Historically, Questar Gas operated as somewhat of an island with regard to its gas supplies, and the heat content of the gas delivered to its Utah customers was higher than that in gas produced in other parts of the country. R. 235 at 11. This was a result of the nature of the natural gas supply that was prevalent in the Intermountain West from the 1920s to the mid-1990s. Appliance orifices were set accordingly. As required by its tariff and Commission rule,[30] Questar Gas managed the gas supplies reaching its customers so as to be within the prescribed heat-content range and to ensure compatibility with their appliances. R. 246 at 20. Thus, while coal-bed methane could have been used in large quantities in every other area of the country without causing a heat-content compatibility problem, such was not the case in the Company's Utah service territory. *Id.* at 34.

Beginning in 1985, FERC began a course of regulatory changes under the Natural Gas Act that ultimately resulted in a competitive interstate pipeline grid and nationwide market.[31] As a result of these FERC actions, Questar Pipeline became a common carrier with no ability to discriminate in favor of Questar Gas or its customers. This common

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[30] *See* Utah Admin. Code R746-320-2.B; R. 246 at 10-11, 13.

[31] R. 246 at 22; R. 297 at 9. *See also* Order No. 436, 1982-85 FERC Stats. & Regs., Regs. Preambles ¶ 30,665 (1985); Order No. 636, 1991-96 FERC Stats. & Regs., Regs. Preambles, ¶ 30,939 (1992).

carrier status forced the Company's gas supplies to be mixed with increasing quantities of other pipeline customers' natural gas streams as Questar Pipeline, in addition to carrying the Company's supplies, was required to expand its transportation of gas for others. If gas supplies met FERC-approved tariff standards, as coal-bed methane did, Questar Pipeline could not refuse to transport them. R. 246 at 22, 39. In addition, other pipelines began to build facilities to carry gas into and out of the Rocky Mountain region. *Id.* at 17. Thus, the heat content of natural gas transported on Questar Pipeline and delivered to Questar Gas began to change as Questar Pipeline was forced by FERC to integrate into the national pipeline grid. *Id.* at 23.

3. Background of Coal-Bed Methane from the Ferron Area

In the 1990s, the heat content of the Company's gas supplies generally was declining. *Id.* at 14. The introduction onto the Company's system of coal-bed methane from the Ferron area (near Price, Utah) was one of the factors leading to that decline.[32] Coal-bed methane is nearly pure methane, and has a lower heat content than other gases containing more ethane, butane or propane. *Id.* at 18; R. 279 at 13. It was introduced onto Questar Pipeline's system in the early 1990s after Questar Pipeline built facilities extending its pipeline and allowing the gas to be transported on the interstate grid. R. 246 at 12. Questar Gas was the only Questar Pipeline customer with heat-content standards that were inconsistent with the heat-content of the coal-bed methane as delivered to the pipeline. *Id.* at 24, 34. Although the coal-bed methane was originally being purchased

[32] *Id.* at 31. Another significant factor in the declining heat content was the removal of ethane, butane and propane by producers from the natural gas stream when market conditions justified the removal. *Id.* at 25-26.

by parties other than Questar Gas, it was being delivered to Questar Gas because the coal-bed methane was the closest source of gas to the Questar Gas delivery points at Payson and Indianola in Utah County.[33]

For several years, the volumes of coal-bed methane being delivered to Questar Gas were insignificant and could easily be blended with other sources of gas without having a significant impact on the heat content of the overall supply. *Id.* at 12. However, as the production of coal-bed methane increased more substantially and rapidly than projected (*id.*; R. 279 at 28-30), it became apparent in 1997 that the heat content of the coal-bed methane would begin to affect the overall heat content of the supplies being delivered to Questar Gas at its points of delivery in Payson and Indianola by summer 1999. R. 246 at 40-43. Questar Gas realized that there would be a critical compatibility problem between its customers' appliances and the gas supplies those appliances would be receiving. *Id.* at 34. This problem and the continuing decline in heat content of other sources of gas led the Company to seek a tariff change to lower the heat content approved for its gas supplies in April 1998. R. 235 at 8; R. 246 at 35. The evidence presented in Docket No. 98-057-12 indicated that it would take at least four years for customers to adjust their appliances on an expedited basis and that the expense of this expedited

[33] R. 246 at 31. The physics of the pipeline system are such that, for example, a customer in Wyoming "purchasing" gas supplies from a producer in Utah does not necessarily get the physical molecules produced in Utah. Rather, the purchaser buys a certain volume of gas, but obtains whatever molecules happen to be in the pipeline at the point of delivery to the purchaser, while some other purchaser will receive the physical molecules produced in Utah. *Id.* at 50-54.

program would be more than $100 million.[34] Therefore, Questar Gas proposed to provide customers a reasonable period of time, estimated at 10 years, to replace appliances or to have their appliance inspected and, if necessary, adjusted in the normal course. R. 235 at 9-10. About this same time, the Company determined that the removal of CO_2 from coal-bed methane provided gas that was compatible with the range of overlap between the new lower-heat-content and the old higher-heat-content specifications. R. 235 at 11; R. 246 at 42-43. Accordingly, Questar Gas entered into a contract with Questar Transportation to build and operate the CO_2 Removal Plant. R. 235 at 11-12. The contract assured that the CO_2 removal costs would be no greater than if Questar Gas owned and operated the plant itself. *Id.* at 27.

Much of the Commission's cause for questioning the Company's prudence in the *2004 Order* resulted from the fact that the coal-bed methane had been introduced initially onto the Company's system by virtue of Questar Pipeline transporting it rather than being purchased or necessary for the Company's customers. R. 1144 at 33. In addition, the Commission wondered if the Company might have identified the heat-content compatibility problem and potential solutions sooner absent affiliate involvement. *Id.* However, while Petitioners cite the *2004 Order* for all manner of "findings" about

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[34] *2004 Order* at 5, 18; R. 130 at 5 fn 1; R. 235 at 9. *See also* Prepared Testimony of Alan K. Allred, Docket No. 98-057-12 (Feb. 1, 1999) at 6-7 ("[Questar Gas] attempted to develop an estimate of the cost and time required to have approximately 620,000 Utah customers have their appliances adjusted to the new setpoint . . . . This resulted in a total cost of about $111 million. Discussions with HVAC contractors revealed that they did not see any way to accomplish this work in 1-2 years. They thought that even 4-5 years was too optimistic. Both [Questar Gas] and HVAC contractors were concerned with the cost, disruption, confusion and inconvenience customers would experience with a rapid re-orificing solution.").

imprudence, the *2004 Order* was merely a determination by the Commission that the Company had failed to meet its burden of proof of demonstrating, through contemporaneous documentation, that costs of CO_2 removal should be included in rates. As the Commission said:

> Due to our conclusion that Questar failed to establish an adequate evidentiary basis upon which we could conclude that its decision to enter into the processing contract and incur the costs it agreed to were prudent and not unduly influenced by its affiliate relationships, we see no avenue for recovery, based on this record, while remaining compliant with the Supreme Court's decision.

Clarification Order at 6. The Commission did not find that the Company was imprudent. And nothing in the *2004 Order* precluded the Company from seeking to meet its burden of showing that CO_2 removal was prudent in the future, particularly based on different facts and circumstances. To the contrary, the Commission stated that "our [*2004 Order*] does not preclude Questar from seeking recovery of CO_2 processing costs in other dockets." *Id.* at 4-5.

4. Coal-Bed Methane Considered in Light of What Is Known Today

The undisputed testimony in the current case has shown that the facts and circumstances with regard to coal-bed methane have changed. The fact is that coal-bed methane is being discovered and produced throughout the Rocky Mountain region and nation (again, Questar Gas and its affiliates are not the producers) and is becoming an increasingly important source of natural gas supply as other sources dwindle. R. 246 at 17, 26; 279 at 23-24. In Utah, coal-bed methane accounted for 31 percent of total natural gas production in 2004 (*id.* at 19), and 10 percent of the national supply. *Id.* at 15. Thus,

given the proximity of major supplies of this gas close to the Company's system, the nature of the interstate pipeline grid, and the generally increasing prevalence of this lower heat-content gas source regionally and throughout the nation, it was inevitable that the heat content of the Company's gas supplies would be lower, regardless of whether or not Questar Pipeline had built facilities in the 1990s to transport the Ferron-area gas. R. 246 at 25-26; R. 279 at 18-20.

The undisputed evidence likewise demonstrated that the changes in gas supplies were beyond both the Company's and its affiliates' control. R. 246 at 31-32; R. 279 at 22-26; R. 297 at 8-11. It demonstrated that as a result of large proven reserves in the area, coal-bed methane would likely provide a significant portion of the gas Questar Gas receives in the future from both Kern River Pipeline and Questar Pipeline (R. 279 at 22-23), and that without those reserves the price Questar Gas pays for natural gas would increase significantly. R. 283 at 11-15; R. 297 at 22. It also demonstrated that all coal-bed methane shares the characteristic of lower heat-content due to the fact that its hydrocarbons are nearly pure methane and that it contains CO_2, and that it would be imprudent for Questar Gas not to plan to accept increased quantities of coal-bed methane in the future. R. 279 at 22.

Further, the undisputed evidence showed both that the Company and its affiliates could not in fact have predicted the huge increase in production of coal-bed methane in the 1990s sooner than they did (*id.* at 29-30), and that in any event the development of large quantities of coal-bed methane geographically near the Company's system has reduced the market price of all gas supplies purchased by the Company (R. 283 at 29-30;

R. 297 at 21-23), saving the Company's customers approximately $30 million in purchased gas costs from October 1998 through December 2004 and $12 million from January 2003 through December 2004 alone. R. 283 at 28-29. The evidence further demonstrated that the availability of coal-bed methane and the construction of Mainline 104 (which resulted from the development of coal-bed methane),[35] allowed Questar Gas to realize additional savings of approximately $3 million per year.[36] The evidence showed that all of the identified cost savings would continue in the future. *Id.* at 28-29. The evidence showed that because Questar Gas had not sought a change in Questar Pipeline's tariff specifications to keep coal-bed methane off the pipeline or to require producers to pay for CO_2 removal, Questar Gas had avoided costs of processing its Company-owned gas to meet the more stringent standards of from $8 million to $18 million per year. *Id.* at 25, 29; R. 292. The evidence shows the benefits of utilizing coal-bed methane result in lower costs to the Company's customers far exceeding the $4 million per year of CO_2 removal costs provided in the Stipulation.[37]

5. Analysis of Gas Management Alternatives

The undisputed evidence explained the safety risks to customers from the introduction of currently purchased quantities of coal-bed methane into the Company's

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[35] Mainline 104 is a pipeline constructed by Questar Pipeline in 2001 to transport natural gas from the Ferron area to an interconnection with Kern River Pipeline near Goshen, Utah. R. 246 at 44.

[36] R. 283 at 15-20. The $3 million savings is composed of released capacity savings in Mainline 104 and segmentation savings made possible by Mainline 104. *Id.*

[37] In addition, CO_2 removal is less expensive than other common types of processing that must be done with non-coal-bed-methane gas to deal with gas with excessive heavy hydrocarbons or to remove hydrogen sulfide. R. 279 at 14.

system while many customers still have appliances set to the earlier, higher-heat-content specifications. R. 246 at 13-14; R. 304 at 14-15. The evidence demonstrated that the Commission's *2004 Order* was the guide for the Company's decision-making process in dealing with this issue. R. 235 at 20-22. The evidence also demonstrated that Questar Gas, with input from the Division and Committee, initially identified and analyzed 14 alternatives for addressing the prospective heat-content issue. Some of the alternatives considered included petitioning FERC for a change in Questar Pipeline's gas quality specifications; precision or gross blending; various pipeline projects; propane injection; and gas shut in. R. 246 at 55-69. Using the Commission's guidelines on how to document prudence from the *2004 Order*, the parties determined which alternatives were preferable. R. 235 at 20-22; R. 246 at 56. Continued CO_2 removal and precision blending of gas streams on Questar Pipeline's southern system with CO_2 removal as a backup during seven months of the year were identified by all participants as the alternatives most worthy of additional consideration. R. 235 24-25; R. 246 at 63-69. The costs of the two alternatives were essentially identical over the short term. R. 235 at 24.

The undisputed evidence demonstrated that the options of shutting in coal-bed methane or going to FERC to prevent coal-bed methane from coming into the Company's system were neither viable nor desirable. R. 235 at 30; R. 246 at 58-60; R. 279 at 4, 12; R. 283 at 24-25. Further, notwithstanding the fact that Questar Gas volunteered to pursue a FERC proceeding if requested, no party, including the Committee, desired that Questar Gas go to FERC after the issue was thoroughly explored in the technical conferences. R. 235 at 26; R. 246 at 58-59. In addition to the low likelihood of success based on FERC

precedent, going to FERC was inadvisable because low-cost, Company-owned gas could be negatively affected by a "favorable" outcome. R. 246 at 58; R. 283 at 24. In other words, if the Company succeeded in tightening the standards regarding the gas allowed on the Questar Pipeline system, those new standards might easily be used *against* Questar Gas to either keep Company-owned gas that it currently ships on Questar Pipeline off the system or to require that it be further processed by Questar Gas before shipping because, at times, of its excessively high heavier hydrocarbons. R. 246 at 58; R. 283 at 24. As noted previously this avoided costs of $8 million to $18 million per year. R. 283 at 25, 29; R. 292.

The undisputed evidence demonstrated that the potential affiliate conflict in having Questar Transportation own and operate the CO_2 Removal Plant had been addressed by requiring that the costs incurred by Questar Gas under any contract with Questar Transportation be no higher than if Questar Gas owned and operated the plant itself and that they be lower than if the plant were owned and operated by a third party. R. 235 at 27.

6. Stipulation

During the hearing on approval of the Stipulation, testimony was presented by Barrie McKay for Questar Gas, William Powell, Ph.D. for the Division, and Dan Gimble, for the Committee. Mr. McKay testified that Questar Gas had responded to over 400 discovery requests from the Division and the Committee and that the responses consisted of nearly 1,000 pages of studies, analyses and information on the issues related to gas processing, the alternatives and affiliate issues. R. 2297 at 13. He testified that the

negotiations that led to the Stipulation were vigorous, intense and difficult and involved the outside experts retained by the Division and Committee, as well as the Division and Committee staffs. *Id.* at 15. Mr. McKay testified that the two alternatives identified in the technical conferences as being the preferred alternatives, precision blending with CO_2 removal as a backup and year-round operation of the CO_2 Removal Plant, had essentially identical costs over the anticipated transition period. *Id.* at 54. Based on additional analysis and information received from third parties following the technical conferences and filing of testimony, however, Questar Gas determined that with physical adjustments to the CO_2 Removal Plant and operational cooperation from third parties, the CO_2 Removal Plant could provide processing to third parties on an increased basis. *Id.* at 16, 55. This increased processing for third parties resulted in the possibility of lower processing costs to the Company's customers. *Id.* Operating the plant year round and providing processing services to third parties, accordingly, became the preferred alternative because of potential benefits to Questar Gas customers stemming from revenue sharing and cost savings. *Id.*

Dr. Powell testified that the Division conducted and documented its own analysis of the alternatives addressed by Questar Gas and other alternatives, and engaged an independent consultant to assist in that evaluation. *Id.* at 29-30. The Division concluded that operation of the CO_2 Removal Plant during the transition period was a reasonable way to meet the defined objectives. *Id.* at 30.

Mr. Gimble testified that the Committee staff and its retained expert participated in the negotiation of the Stipulation and that the Committee itself had three meetings at

which it deliberated on the Stipulation. *Id.* at 29-30, 41. The Committee's expert reached the conclusion that the presence of coal-bed methane on the Company's system presented an increased safety risk for customers.[38] Mr. Gimble further testified that circumstances had changed from the prior dockets in which the Committee opposed recovery of CO_2 removal costs. R. 2297 at 35-36, 62. The Committee's prior view that the gas had been introduced for the benefit of Questar Pipeline with little corresponding benefit to the Company's customers was no longer applicable because coal-bed methane is now a significant and beneficial source of the supply purchased by Questar Gas for its customers. *Id.* at 30-32, 36. The Committee concluded that the Company had provided compelling evidence that CO_2 removal was the most effective remedy for dealing with the safety risk until customer appliances are transitioned to be compatible with the new lower-heat-content range. *Id.* at 36.

In response to questions from the Commission, the witnesses confirmed that all parties agreed that the alternative of going to FERC to address the issue was not desirable. *Id.* at 44. In response to additional questions, the witnesses explained the benefits anticipated from third-party processing and that revenue from third-party processing was a potential benefit that made this alternative preferred over precision blending with CO_2 removal as a backup. *Id.* at 54-57. Dr. Powell and Mr. Gimble further testified that the rate recovery provided in the Stipulation was within the range of

[38] *Id.* at 33-34. In connection with the efforts by Mr. Ball to intervene, the Committee disclosed that one of the reasons for its earlier position was that Mr. Ball had been unwilling to allow the Committee to obtain outside expert assistance on coal-bed methane and processing issues. R. 681 at 5.

recovery those parties would have recommended had the matter gone to hearing. *Id.* at 65. Mr. McKay noted that the estimated costs of CO_2 removal would increase a typical customer's bill by approximately 50 cents per month. *Id.* at 66. This increase does not take into account the benefits in lower gas costs of coal-bed methane.

All witnesses agreed that customers were not being asked to pay twice to deal with the changing heat content of gas on the Company's system, once through appliance adjustments and once through increased rates for CO_2 removal. Customers should have their appliances replaced or inspected and adjusted periodically anyway, so they would incur those costs regardless of the changing heat-content. *Id.* at 70. They also noted that customers had received a benefit of lower-cost gas through the development of coal-bed methane near the Company's distribution area that much more than offset the cost of CO_2 removal. *Id.* at 14, 30, 63, 69.

7. Commission Findings

The cumulative weight of the verified application and the sworn written and live testimony was overwhelming in this case, and the Commission reasonably relied on substantial evidence to support the finding in the *2006 Order* that the Company acted prudently. R. 1144 at 38. Based on substantial evidence, the Commission found, among other things, that:

- "The record in these dockets . . . indicates that the Company's customers have benefitted from the shipment of coal bed methane by Questar Pipeline and that coal bed methane has become an important component of Questar Gas's gas supplies. Since 2002, coal bed methane has accounted for a significant portion (up to 40 percent) of the Company's annual gas supply purchases, compared to less than 5 percent only a few years earlier." *Id.* at 34.

- "This increasing presence of coal bed methane on the Questar Pipeline system results from the expansion of the interstate natural gas pipeline grid to transport new coal bed methane from wells throughout the Rocky Mountain region. As this expansion continues, it is very likely that additional coal bed methane will enter Questar Pipeline's system, and thus Questar Gas's system." *Id.*

- "[H]aving the CO_2 Removal Plant owned and operated by Questar Transportation does not result in any prejudice to Questar Gas or its customers. The costs incurred by Questar Gas are the same as if the plant were owned and operated by Questar Gas." *Id.*

- "The provisions in the Stipulation that permit recovery of only 90% of non-fuel costs, limit fuel costs to 360,000 Dth/year, require the sharing of third-party processing revenues in excess of $400,000 per year, and prohibit recovery of costs for additional CO_2 Removal [P]lant facilities assure that the interests of Questar Gas's customers are given priority in this arrangement." *Id.* at 34-35.

- "[N]o party believes it would be reasonable to pursue actions at the FERC to attempt to keep coal bed methane off of Questar Pipeline. Indeed, it appears that pursuing such actions would be detrimental to Questar Gas customers." *Id.* at 35.

- "The extensive analysis represented by these technical conferences and discovery activities resulted in comprehensive and detailed oral and written testimony by Company, Division, and Committee witnesses. Key within this testimony are the Parties' conclusions that Utah customers have benefitted financially from the presence of coal bed methane on the Questar Gas system, that approaching FERC to attempt to preclude coal bed methane from the Questar Gas system would not be a viable alternative, and that the affiliate interests which so concerned us in prior dockets have been subordinated to the interests of Questar Gas customers." *Id.* at 36-37.

- "Throughout the technical conference process, Questar Gas repeatedly sought input from other parties on how to best address the issues presented by the presence of coal bed methane going forward. No participant challenged the conclusions Questar Gas presented as being prudent and in the best interest of customers, and no participant suggested any alternative as more preferable." *Id.* at 37.

- "Questar Gas clearly identified its objective to address the safety issue posed by the presence of coal bed methane on its system. The Company identified alternatives to meet this objective, employed reasonable methods and criteria in evaluating the alternatives, and adequately recorded and documented its evaluation. **The Company carefully considered potential conflicts between affiliates and placed the interests of its customers before those of its affiliates.**

This process satisfies the concerns outlined in our 2004 Order. We therefore conclude that a reasonable, unaffiliated utility, knowing what Questar Gas knew or reasonably should have known, could reasonably have acted the way Questar Gas has acted in choosing to use the CO_2 Removal Plant since February 2005 and thereafter." *Id.* at 37-38. (emphasis added).

- "Providing a transition period for customers to have their appliances inspected and, if necessary, adjusted to the range now specified in Questar Gas's tariff is reasonable both because of the uncontested safety concerns and because customers need additional time to complete necessary inspections and adjustments." *Id.* at 38.

- "Given the extensive investigation and analysis undertaken by Questar Gas, the Division and the Committee to identify and compare alternatives for dealing with this risk, we find that operation of the CO2 Removal Plant in accordance with the terms of the Stipulation provides a reasonable, reliable, cost-effective solution during the necessary transition period." *Id.*

- "Based on the findings of fact in the foregoing sections of this Order, we conclude that Questar Gas's use of the CO_2 Removal Plant from and after February 1, 2005 to manage the heat content of its gas supplies is prudent and that the partial recovery of costs provided in the Stipulation is reasonable and in the public interest." *Id.*

V. SUMMARY OF ARGUMENT

Petitioners lacked standing to seek rehearing or reconsideration of the Commission's *2006 Order* because they were not parties to the case or persons pecuniarly interested in Questar Gas. Seeking rehearing or reconsideration is a jurisdictional prerequisite to an appeal. In addition, Mr. Ball and Ms. Geddes have abandoned their appeal of the Intervention Order. Therefore, the appeals should be dismissed.

Petitioners' res judicata arguments are fundamentally flawed. This Court has repeatedly held that res judicata does not apply to the Commission's legislative ratemaking function for good reason: facts and circumstances and even the public

interest may change over time. The appropriate issue for the Commission to consider in this case was what a prudent utility should do *today* about the presence of coal-bed methane gas in close proximity to its system—should it purchase that gas or attempt to keep it off its system? And if it should purchase the gas, what should it do to ensure compatibility between the gas supply and customers' appliances, to ensure customer safety? These are the issues that the Commission and parties appropriately focused on.

Petitioners, on the other hand, would have the Commission reject the very option that a thorough review has shown is in the best interests of customers. They would have the Commission get sidetracked by an erroneous view of res judicata and focus on the fact that Questar Gas did not meet its burden of demonstrating the prudence of its response to coal-bed methane when the CO_2 Removal Plant was built, rather than focus on whether Questar Gas can demonstrate the prudence of its response to coal-bed methane today. In reality, they want Questar Gas to continue to purchase coal-bed methane and to continue to pay for CO_2 removal, but they do not want any part of the cost of CO_2 removal included in rates.

Petitioners' view of res judicata is simply wrong. The Commission did not preclusively determine in the *2004 Order* that Questar Gas was imprudent in incurring CO_2 removal costs even in the 1990s. More to the point, the Commission did not preclusively determine in the *2004 Order* that no costs associated with CO_2 removal could ever be recovered. The Commission clearly stated that it was not making such a determination in the *Clarification Order*. The Commission has not made any determination in this case that is inconsistent with the *2004 Order*. Nor is Questar Gas

seeking to recover the same CO_2 removal costs it sought in the 1999 rate case—the $29 million denied in the *2004 Order* has been refunded to customers and Questar Gas does not seek to get it back. The prudence of the Company's response to coal-bed methane in this case falls squarely within the type of ratemaking decisions that are incompatible with the doctrine of res judicata—it involves different costs, different facts, and different issues, from different time periods, and is part of the Commission's legislative function of determining just and reasonable rates with which the Court does not interfere unless the Commission's decision is not supported by substantial, competent evidence. Petitioners' argument on inconsistency misses the point.

Petitioners' evidentiary claims lack merit. They have failed to marshal the evidence in support of the *2006 Order* and thereby have failed to preserve any factual objection to the sufficiency of the evidence. The Commission relied on overwhelming, competent evidence in finding that the Company's continued purchase and processing of coal-bed methane was prudent. Petitioners have not supported nor could they support their superficial claim that all of the evidence in the record was incompetent. In any event, objections to admission of evidence on competence grounds are waived if not made at the time the evidence is offered.

Petitioners procedural claims lack merit. The Commission provided fair and appropriate notice of all proceedings in this case, and it was perfectly appropriate for Chairman Campbell to participate. The lead Petitioners had actual notice of the issues being addressed and of Chairman Campbell's participation for months, and yet chose not to intervene. Petitioners should not be heard to raise procedural objections after the fact,

when the case was concluded before they sought to participate. Late-arriving parties must take the case as they find it.

Petitioners' arguments that affiliate transactions are absolutely barred by section 54-4-26 of the Utah Code or that the 1994 Planning Guidelines require submission and approval of the contract with Questar Transportation are incorrect. This Court has regularly held that affiliate transactions are subject to higher scrutiny, so, obviously, they are not barred. The 1994 Planning Guidelines have no application to this case. In any event, the Commission carefully reviewed potential affiliate conflicts and found based on substantial evidence that Questar Gas had put the interests of its customers first. Questar Gas was not required to submit its contract with Questar Transportation for prior approval, and the absence of the contract from the record is irrelevant because the Commission has prescribed the terms of rate recovery that will be permitted. The Commission complied with all requirements for approval of settlements.

Petitioners other arguments are irrelevant and unpersuasive. Although the Commission did not rely on the technical conferences in reaching its conclusions, they are appropriate vehicles for investigation and analysis. Petitioners' argument that the *2006 Order* relies on a cheap gas exception reveals Petitioners' lack of understanding of prudence and the inequitable and overreaching nature of their position.

The *2006 Order* in this case is based on substantial evidence, a sound and thorough process and reasoned decision-making. Petitioners' attempt to obscure that fact by painting a misleading, negative picture about Questar Gas based on a timeframe that is irrelevant to this appeal should be rejected. The Court should dismiss their appeal for

lack of jurisdiction or affirm the Commission's *2006 Order*. Petitioners' request for attorneys fees should be denied.

VI. ARGUMENT

A. The Court Lacks Jurisdiction to Consider These Appeals Because Petitioners Lacked Standing to Seek Reconsideration of the Orders or Have Failed to Preserve any Standing They May Have Had.

Questar Gas has already briefed the jurisdiction and standing issue in memoranda in support of its motions to dismiss Petitioners' appeals. Rather than repeating those arguments, Questar Gas attaches its memoranda in support of its motions to dismiss as Addenda 5 and 6, and adopts them herein by reference. For the reasons set forth in the memorandum in Case No. 20060279-SC (Addendum 5) all of the Petitioners lacked standing to seek reconsideration of the *2006 Order* because they were not parties to the proceeding below, having not sought intervention at all, or, in the case of Mr. Ball and Ms. Geddes, did not seek intervention until all proceedings were concluded. In addition, none of the Petitioners provided evidence that he or she has a pecuniary interest in Questar Gas or seeks to represent such an interest so as to have a claim for standing pursuant to Utah Code Ann. § 54-7-15(2)(a). This Court has repeatedly held that a petition for reconsideration is a jurisdictional prerequisite for appeal.[39] Therefore, the appeal of the *2006 Order* should be dismissed.

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[39] *See e.g., Beaver County*, 2001 UT 81, ¶ 29-30. ("[The Court is] without jurisdiction to review administrative orders unless and until the [Petitioners] apply for review or rehearing pursuant to section 54-7-15 of the Utah Code."); *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 48-49 (Utah 1988) ("[T]he parties' failure to request rehearing before the PSC leaves this Court without subject matter jurisdiction over the petition . . . .").

For the reasons set forth in the memorandum in support of the motion to dismiss in Case No. 20060280-SC (Addendum 6), Mr. Ball and Ms. Geddes' appeal of the Intervention Order should be dismissed. The grounds for their appeal are so insubstantial as not to merit further consideration by the Court. They inexcusably did not seek intervention until after all proceedings in the case were concluded. It is not even debatable that intervention at that point would have impaired the interests of justice and the orderly and prompt conduct of the proceeding. *See* Utah Code Ann. § 63-46b-9(2)(b). Mr. Ball and Ms. Geddes also failed to preserve issues for review in their Request for Reconsideration, and, by failing to seek a stay of the *2006 Order*, they failed to preserve their right to appeal the *2006 Order* and, therefore, review of the Intervention Order is moot.

In addition, Mr. Ball and Ms. Geddes have failed to include any argument on the Intervention Order in their briefing to the Court, either intentionally waiving their appeal of the Intervention Order or seeking to place the burden on the Court to determine the merits of the appeal without the assistance of briefing. In either case, their inaction warrants dismissal of their appeal. *See*, *e.g.*, Utah R. App. P. 26(c); *MacKay v. Hardy*, 973 P.2d 941, 947-48 (Utah 1998) ("This court, as well as the court of appeals, has held in numerous cases that we will not address issues not adequately briefed."); *Phillips v. Hatfield*, 904 P.2d 1108, 1110 (Utah Ct. App. 1995); *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14 ("An issue is inadequately briefed when 'the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'"(citation omitted)).

B. The *2006 Order* Is Not Barred by Res Judicata.

In various forms addressing factual allegations and legal argument, Petitioners' res judicata argument makes up a substantial portion of their Brief. They seek to confuse the matter before this Court—namely the Commission's *2006 Order* allowing partial recovery for CO_2 processing costs starting February 1, 2005. Petitioners base their arguments solely on questions raised in the *2004 Order* regarding cost recovery from June 1999 to May 2004. They mischaracterize the *2004 Order*, asserting that it "finally, unequivocally, and conclusively disallows any and all gas processing costs" (Br. 61) and ignore the language in the *2004 Order* and the *Clarification Order* that specifically limits the *2004 Order* to the 1999-2004 time period and concludes that Questar Gas is not precluded from seeking to recover CO_2 processing costs in other dockets. Petitioners' res judicata claims lack merit.

1. Res Judicata Does Not Apply Because the *2004 Order* and the *2006 Order* Were Both Exercises in Legislative Ratemaking.

This Court has consistently held that res judicata has only limited application in ratemaking proceedings. In *Utah State Bd. of Regents v. Utah Public Serv. Comm'n*, 583 P.2d 609 (Utah 1978), the Court observed that "[b]y their very nature, public utility rates are inescapably subject to constant circumspection and justification. The Commission is charged with the responsibility of establishing rates as are 'just and reasonable' and the propriety of such rates is forever subject to challenge upon complaint by interested parties who are entitled to a hearing and to introduce evidence." *Id.* at 611.

Petitioners cite *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245 (Utah 1992), in support of their argument that the *2004 Order* precludes recovery of CO_2 removal costs in this case. Br. 57. However, the case actually supports the *2006 Order*. In *Salt Lake Citizens*, the petitioner made essentially the same argument Petitioners make here. It argued that a 1969 decision disallowing recovery for charitable contributions that had previously been allowed was res judicata with regard to recovery of future charitable contributions in other cases. 846 P.2d at 1250-51. The Court held that res judicata was inapplicable, stating, "What constitutes a just and reasonable rate of return, the cost of capital, **and the various expense** and revenue **amounts cannot be decided on the basis of a prior rate proceeding, but must be determined anew** . . . ." in each case. *Id.* at 1251 (emphasis added). The Court further observed that even if an expense is of a type involving a legal determination that has been previously adjudicated (and, therefore, may implicate stare decisis), the mere difference in the level of the expense from year to year is sufficient to prevent the application of res judicata.[40]

This position is consistent with the holding of the Court in *Utah Dept. of Admin. Services v. Public Serv. Comm'n*, 658 P.2d 601 (Utah 1983) ("*Wexpro II*"). One question in that appeal was whether an order approving transfers of property interests would be

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[40] *See id; see also Reaveley v. Public Serv. Comm'n*, 436 P.2d 797, 799-800 (Utah 1968)("[T]he law does not require an administrative body to be bound by the rules of stare decisis as applied to courts. . . . '[A]dministrative bodies are not ordinarily bound by their prior determinations or the principles or policies on which they are based.' . . . Certainly an administrative agency which has a duty to protect the public interest ought not be precluded from improving its collective mind should it find that a prior decision is not now in accordance with its present idea of what the public interest requires." (citation omitted)).

final. The Court said, "In contrast to the lack of finality that exists as to orders fixing public utility rates, the principles of res judicata apply to enforce repose when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights and to apply a remedy." *Id.* at 621 (footnote omitted). Thus, principles of preclusion may apply to some decisions of the Commission, but not to ratemaking decisions.

Consistent with these principles, "[t]he commission may at any time, upon notice to the public utility affected and after opportunity to be heard, rescind, alter, or amend any order or decision made by it." Utah Code Ann. § 54-7-13. In addition, the Legislature has recently made clear in the Energy Resource Procurement Act, Utah Code Ann. §§ 54-17-101, *et seq.*, that a Commission decision to disallow recovery of the costs of a resource now "may not prejudice . . . the right of an energy utility to . . . seek recovery . . . in a future rate proceeding." *Id.* § 54-17-404(5)(a)(ii).

When considered in light of these well-established principles, Petitioners' position is baseless, and completely inconsistent with the Commission's statutory ratemaking function and the *Clarification Order*. The *2006 Order* found that the continued purchase of coal-bed methane and continued CO_2 removal to allow customers time to complete routine replacement or adjustment of their appliances was prudent from February 1, 2005 going forward. R. 1144 at 38. As the evidence established, it was the preferred course of action. *Id.* at 36-38. Yet because the Commission had previously determined in the 1999 general rate case that the Company had failed to meet its burden to demonstrate prudence sufficient to warrant rate recovery based on the evidence presented then, Petitioners now

argue that the preferred option for addressing coal-bed methane can never be pursued (at least if any rate recovery is involved). This view demonstrates a complete lack of understanding of the principles of ratemaking, and if followed would not only unfairly harm Questar Gas but unfairly harm its customers.

Even assuming (contrary to the actual finding of the *2004 Order*) that the Company's conduct in the 1990s was somehow imprudent, Petitioners' argument is plainly contrary to ratemaking principles and the public interest. For example, assume that an electric utility built a generating plant in 1998, but that the output of the plant was not needed at that time or that the cost of electricity from the plant was much more expensive than reliable alternative sources of supply. The Commission might find that the utility could not demonstrate that the costs associated with production of electricity from the plant in 1998 were prudently incurred and disallow all or some part of them. However, assume that in 2006, based on changes in demand or market prices for other sources of supply, the electricity from the plant is both necessary and favorably priced. The Commission would clearly be justified in allowing the utility to include the cost of electricity from the plant in current rates, and its failure to do so would be contrary to the interests of customers. *See* Utah Code Ann. § 54-17-404(5)(a)(ii).

This is similar to what occurred here. Questar Gas did not meet its burden of proof to recover processing costs in the 1999 to 2004 time period and, as a result, refunded $29 million to customers and recovered no CO_2 removal costs prior to February of 2005. But as facts and circumstances changed and as Questar Gas put on a compelling

case meeting its burden of proof, the Commission appropriately allowed cost recovery for a different time period, based on different facts and circumstances.

As the Court has consistently held and as the Legislature has made clear, res judicata does not bar the Commission allowing expenses of a type previously disallowed if the evidence supports a finding that the expenses are currently prudently incurred.

2. Claim Preclusion Does Not Apply.

Even if the *2006 Order* constituted the type of Commission decision to which res judicata might apply, neither the claim preclusion nor the issue preclusion branch of res judicata would be applicable in this case.

The claim preclusion branch of res judicata deals with previously adjudicated claims and causes of action, and bars the re-litigation of any claim or cause of action that has been the subject of a prior final judgment on the merits. *See, e.g., Macris & Associates, Inc. v. Neways, Inc.*, 2000 UT 93, ¶¶ 17-20, 16 P.3d 1214. Three elements must be present in order for a claim to be precluded: "First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits." *See id.* ("All three elements must be present for claim preclusion to apply.") (citation omitted).

Petitioners assert that claim preclusion applies based on the *2004 Order*, but that assertion is erroneous. At a minimum, the second requirement of claim preclusion is missing from this case. The "claim" for recovery rejected by the Commission in the *2004*

Order was the claim for partial recovery of CO_2 removal costs incurred from June 1999 through May 2004. The claim at issue in this case was for partial recovery of costs incurred since February 1, 2005. The two are simply not the same claim or cause of action.

The cases cited by Petitioners in support of their res judicata argument are either inapposite or fail to support their argument. For example, in *Philadelphia Electric Co. v. Pa. Public Util. Comm'n*, 433 A.2d 620 (Pa. Commw. Ct. 1981), the utility sought re-litigation of precisely the same $10.5 million dollars that had been disallowed previously due to imprudent construction management. *See id.* at 624. It claimed that it was entitled to raise the same claim again because "it did not have the opportunity to assert its rights and fully litigate the question of the quality of the construction of Salem Unit No. 1 in the prior rate proceeding." *Id.* at 626. Likewise, *Coalition of Cities for Affordable Utility Rates v. Public Util. Comm'n*, 798 S.W.2d 560 (Tex. 1990), deals with the re-litigation of the same claim. In fact, the court noted that if the claim were not the same, the "imposition of res judicata principles would be inappropriate." *Id.* at 563.[41]

The costs that the Company seeks to recover in this case are simply not the same costs covered by the *2004 Order*. The costs addressed by the *2004 Order* have already been borne by Questar Gas, and no one is suggesting that those costs can now be revisited. Rather, as the *2006 Order* expressly stated, "Questar Gas will not recover any gas management operations costs incurred prior to February 1, 2005." R. 1144 at 40.

[41] Petitioners also cite *In re Tariff Filing of CVPS,* 769 A.2d 668 (Vt. 2001)(in this case a party sought to relitigate an issue identical to the issue that had been litigated in a previous proceeding).

In issuing the *2006 Order*, the Commission considered factual circumstances that had never been addressed before in any of the previous coal-bed methane-related dockets. Petitioners' attempt to portray this case as turning on the issues from the 1999 rate case and before rather than contemporary evidence of today's circumstances is baseless. Coal-bed methane continues to be produced every day, and every day the Company must decide how best to respond to the availability of the gas. The undisputed evidence showed that the production of coal-bed methane in close proximity to the Company's system has been a tremendous boon to customers. *Id.* at 37, 39. Not only has the new source of gas saved customers substantial amounts in purchased gas costs, it has replaced dwindling supplies of other sources of gas. *Id.* 1144 at 34.

The Commission determined that the Company responded prudently today to the production of coal-bed methane near the Company's distribution system. That question was addressed transparently and appropriately in this case, and claim preclusion has no applicability to this matter.

3. Issue Preclusion Does Not Apply.

The issue preclusion branch of res judicata prevents any issue directly adjudicated or necessarily involved in the determination of a prior action from being re-litigated in any future action between the same parties or their privies. *Career Service Review Bd. v. Utah Dept. of Corr.*, 942 P.2d 933, 938 (Utah 1997). Four elements are required to establish issue preclusion: "(1) The issue decided in the prior adjudication must be **identical** to the one presented in the action in question; (2) there must be a final judgment on the merits; (3) the party against whom the plea is asserted must be a party in privity

with a party to the prior adjudication; and (4) the issue in the first action must be **completely, fully, and fairly litigated**." *Id.* (emphasis added).

In this case, at least the first and fourth elements of issue preclusion are missing. The issues resolved by the *2006 Order* were not the same issues resolved by the Commission in the *2004 Order* as required to invoke the first element. Nor were the issues addressed by the *2006 Order* litigated at all in the 1999 rate case, let alone "completely and fully" litigated as required to invoke the fourth element. In the current proceeding, the Commission was neither addressing the issue of whether the costs covered by the CO_2 Stipulation from the 1999 rate case were prudently incurred nor was it otherwise remotely addressing costs incurred during the period covered by the *2004 Order*. The issue addressed in this case, whether CO_2 removal costs incurred *since February 1, 2005* were prudently incurred sufficient to warrant partial rate recovery, was not addressed in the *2004 Order* or at any other previous time.

Petitioners seek to distort this conclusion by misrepresenting the intended scope of the *2004 Order*, claiming that the decision "finally, unequivocally, and conclusively disallows any and all gas processing costs." Br. 61 n. 19. The trouble for Petitioners, however, is that the Commission expressly disavowed any such reading of the *2004 Order* in its *Clarification Order*, where it correctly concluded that:

> The [*2004 Order*] addressed only Questar's failure to substantiate approval of the CO_2 Stipulation in these proceedings and our necessary rejection of the Stipulation, which would have permitted recovery of some processing costs through May of 2004. Our reference to the May 2004 end date was dictated by the Stipulation's terms and was not intended to have any other preclusive effect on recovery by Questar. **In regards to**

> **Questar's requests for clarification and reconsideration, we state that our *2006 Order* does not preclude Questar from seeking recovery of CO_2 processing costs in other dockets.** . . . We will need to wait for Questar to make whatever arguments and present whatever evidence it deems appropriate in seeking recovery of these costs, whether incurred pre- or post-May 2004, in whatever dockets Questar may raise the issue.

Clarification Order at 4-5. If the *2004 Order* did "not preclude Questar from seeking recovery of CO_2 processing costs in other dockets," it could not have "finally, unequivocally, and conclusively disallow[ed] any and all gas processing costs" as Petitioners claim. The Commission contemplated further proceedings in a separate docket (this case) to address a long-term solution to coal-bed methane located in close proximity to the Company's distribution system. *2004 Order* at 38-39. Such action was completely consistent with its ratemaking function. Thus, issue preclusion is not applicable based on the facts and circumstances in this case.

4. The Examination of Prudent Alternatives Was Not Foreclosed by Actions or Inactions in the 1990s.

The undisputed evidence in this case is that Questar Gas could not have foreseen the dramatic increase in coal-bed methane production sooner than it did. Even assuming contrary to that evidence as Petitioners do that Questar Gas should have acted sooner in the 1990s, one of the most consistent, erroneous themes in Petitioners' Brief is the theme that the Company's actions or inactions in the 1990s forever "foreclosed" possible alternatives for dealing with coal-bed methane, and that current problems associated with the gas all stem from that prior period. *See, e.g.,* Br. 66-69. Thus, according to Petitioners, the Company can never demonstrate that it is prudently addressing coal-bed

methane because it will forever be stuck with the supposed errors of the past that cannot now be corrected. Br. 62-63.

Petitioners claim to find support for their view of "foreclosed" options in the Commission's *2004 Order*, but such support does not exist. When the Commission spoke of options that could no longer be pursued in the context of the *2004 Order*, it was speaking of the fact that the Company was requesting rate recovery in its *1999 general rate case* (delayed until 2004 by virtue of an extended appellate and remand process), based on a record from the late 1990s. Obviously, the facts at issue in the *2004 Order* had long since passed and could not be undone, and any concerns the Commission had with the facts at issue could only be expressed in terms of what might have been.

However, looking at the circumstances as they exist today, there is no *imminent* safety crisis associated with coal-bed methane. The existence of the CO_2 Removal Plant put-off that crisis at no cost to Questar Gas customers. Thus, there was no question of "what might have been" in this proceeding. Rather, as the Commission and parties considered the appropriate long-term solution to dealing with coal-bed methane in this proceeding, they could and did consider 14 alternatives to see which would best benefit customers and avoid affiliate conflicts of interest. It was not too late to consider these alternatives in this case as the parties were addressing solutions in real time. Petitioners cite no record evidence to suggest that any alternative was foreclosed in reviewing this issue on a forward-going basis. Coal-bed methane continues to be produced and, as a result, regulators and the Company must continue to consider how to address it. This is a

classic ratemaking scenario to which res judicata does not apply. As the Commission stated:

> Our prior finding that the Company failed to demonstrate prudence in its decision to contract for construction and operation of the CO_2 Removal Plant during the 1997 and 1998 time frame is relevant only to the extent the same conditions present in 1997 and 1998 continue to be present. Based on the evidence presented in these dockets, it is apparent these conditions have changed.

R. 1144 at 33.

The Court should consider these facts and circumstances when judging the validity of Petitioners' dramatic criticisms of "lap-dog" regulators (R. 685 at 16) and protestations that Mr. Ball and Ms. Geddes are the only ones left to look-out for ratepayers.[42] By pursuing the course of action chosen by the regulators and Questar Gas after thorough investigation, Questar Gas is providing from $13 million to $23 million per year of net savings for customers when compared with an option (going to FERC) that Petitioners fault the Company for not pursuing.[43]

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[42] R. 1156 at 74 (The Commission "surely must now permit the ratepayers to retain their own attorneys and champion their own and the public interests when all other advocates have abandoned them.").

[43] Savings in purchased gas costs and other capacity related savings resulting from the presence of coal-bed methane and Mainline 104 in 2003 and 2004 as shown on Exhibit 4.7 (R. 291) were $18,295,522 or approximately $9 million per year. Adding the additional processing costs that would be imposed for Company-owned gas if Questar Gas had gone to FERC and been successful in obtaining stricter standards for gas on Questar Pipeline of $8 million to $18 million per year (R. 292), indicates that the strategy pursued by the Company and approved by the regulators has saved customers from $17 million to $27 million per year. And these savings are expected to continue at approximately the same level in the future. R. 283 at 29. The portion of CO_2 removal costs that Questar Gas will recover under the Stipulation is estimated to be approximately $4 million per year before any benefit from the revenue sharing from third-party

Petitioners present analogies such as burning down the uninsured headquarters building that essentially say that Questar Gas was denied recovery of CO_2 processing costs in the past because its actions in the 1990s created the need for those costs and that it is forever barred from recovery of CO_2 processing costs in the future because of those actions. These analogies fail on all fronts.

First, the premise that Questar Gas was denied recovery because of its actions in the 1990s is incorrect. Questar Gas was denied recovery because it failed to meet its burden of proof, not because it was found to have acted improperly. *See 2004 Order* at 38. Second, the *Clarification Order* specifically said that Questar Gas was not barred from seeking recovery of these costs in a future proceeding. *See Clarification Order* at 5. Third, in the forward-looking proceeding that ultimately resulted in the *2006 Order*, the Commission concluded that coal-bed methane is beneficial to the Company's customers, in obtaining substantial gas cost savings, and that it should be part of the Company's gas supply. R. 1144 at 34. Fourth, the record demonstrated that all alternatives had been considered and that there was no evidence to suggest that any alternative had been foreclosed by the Company's prior actions in the 1990s. *Id.* at 21, 36-38. Fifth, the record demonstrated that going to FERC to seek to keep Questar Gas an island in the interstate pipeline grid would have been much more costly to Questar Gas and its customers than the costs of removing CO_2 from coal-bed methane. *Id.* at 35.

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processing. R. 1144 at 48-49. Accordingly, the net savings to customers will be from $13 million to $23 million per year.

The Commission never found or concluded that Questar Gas had done anything remotely akin to burning down its uninsured headquarters building in reviewing costs from 1999 to 2004. In the *2006 Order*, Questar Gas was found to be prudent and coal-bed methane beneficial. Petitioners' claim and issue preclusion arguments lack merit.

C. The Commission's Finding of Prudence Is Supported by Substantial, Competent Evidence, and Its Sound Ratemaking Decision Should Not Be Second-Guessed.

Petitioners do not attempt to marshal the evidence in support of the *2006 Order* in their Brief. To the contrary, they studiously avoid even discussing the verified application and sworn testimony and exhibits filed by Questar Gas and barely refer to the live testimony submitted in the hearing. Instead, Petitioners argue that there is no competent evidence in the record to support the *2006 Order*. Br. 74-75. However, they fail to explain why any specific portion of the evidence is incompetent. This argument is wrong in light of the substantial sworn and competent testimony admitted into evidence in this case. In any event, Petitioners cannot belatedly object to the admission of evidence on the grounds of incompetence.

In *Utah Power & Light Co. v. Public Serv. Comm'n*, 152 P.2d 542, 555 (Utah 1944), the Court characterized the Commission's ratemaking authority as "broad and sweeping in scope" limited by two principles: "first, that the Commission proceed by notice and hearing; and second, that the rates established conform to the standard of 'just and reasonable.'"[44] In light of this broad authority, the Court has also consistently held

[44] *See also Questar Gas Co. v. Public Serv. Comm'n*, 2001 UT 93 at ¶¶ 11-12 (*quoting Utah Dept. of Bus. Regulation v. Public Serv. Comm'n*, 720 P.2d 420, 424 n. 4

that it will not interfere with the Commission's exercise of these broad powers if decisions are based on substantial, competent evidence. *PBI Freight Service v. Public Serv. Comm'n*, 598 P.2d 1352, 1354-55 (Utah 1979) ("It is well settled that this Court will not substitute its judgment for that of the Commission and its findings will not be disturbed when they are supported by competent evidence.").[45]

The Court has also consistently held that a party challenging an order of the Commission must marshal the evidence in support of the order and then demonstrate why that evidence does not support the Commission's findings.[46] If a party fails to marshal the evidence, the Court has held that the party waives any objection to the sufficiency of the evidence.[47] Petitioners have clearly not marshaled the evidence in support of the

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(Utah 1986) (the Commission has "ample general power to fix rates and establish accounting procedures"); *Kearns-Tribune Corp. v. Public Serv. Comm'n*, 682 P.2d 858, 860 (Utah 1984) (the Commission has "considerable latitude in performing its rate-regulation function" and "broad supervisory powers in relation to rates"); *Mountain States Tel. and Tel. Co. v. Public Serv. Comm'n*, 754 P.2d 928, 931-32 (Utah 1988) ("Utah Code Ann. § 54-4-4 (1986) gives the Commission broad discretion in establishing rates for public utilities. Any activities that are related to rate making are therefore subject to the Commission's broad powers in this area.") (citation omitted).

[45] *See also Utah Dept. of Bus. Regulation v. Public Serv. Comm'n*, 734 P.2d 431, 433 (Utah 1986); *Harry L. Young & Sons, Inc. v. Public Serv. Comm'n*, 672 P.2d 728, 730 (Utah 1983).

[46] *Mountain Fuel Supply Company v. Public Serv. Comm'n*, 861 P.2d 414, 424 (Utah 1993)(*quoting First Nat'l Bank of Boston v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990)("Under the [Utah Administrative Procedures Act], the aggrieved party 'must marshal all of the evidence supporting the findings and show that despite the supporting facts, the [agency's] findings are not supported by substantial evidence."). *See also Chen,* 2004 UT 82, ¶ 19, *Tanner,* 2001 UT 18, ¶ 17.

[47] *Chen,* 2004 UT 82, ¶ 19, *Tanner,* 2001 UT 18, ¶ 17. *See also Atlas Steel, Inc. v. Utah State Tax Comm'n*, 2002 UT 112, ¶¶ 40-41, 61 P.3d 1053("[An] eleventh-hour attempt to marshal the evidence and challenge the sufficiency of the evidence in the reply brief is too late. . . . An appellant seeking to challenge the sufficiency of the evidence to

2006 Order. Nonetheless, Questar Gas will briefly review the substantial evidence in support of the *2006 Order* and the Commission's finding of prudence and will demonstrate that the evidence is competent.

1. Substantial Evidence Supports the *2006 Order* and the Commission's Finding of Prudence.

One reading Petitioners' Brief might assume that the only evidence submitted by the parties in support of the Stipulation was the live testimony presented at the hearing on October 20, 2005. Petitioners do not discuss the verified application filed January 31, 2005 or the overwhelming, sworn evidence filed on April 15, 2005, both of which were admitted without objection and carefully considered by the Commission in reaching its decision. In addition and contrary to Petitioners' mischaracterization (Br. 82-83), three knowledgeable and qualified witnesses provided live testimony in support of the Stipulation at the hearing on October 20, 2005. The Commission reviewed all of that evidence in reaching its decision finding the Company's actions were prudent and that approval of the Stipulation was just and reasonable and in the public interest.

The general content of the substantial evidence is included in the statement of facts, above. It was also described in the *2006 Order*. It showed that the declining heat-content of gas supplies in the Rocky Mountain area is beyond the control of Questar Gas and its affiliates, and that the development of large quantities of coal-bed methane geographically near the Company's system has provided, and will continue to provide,

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support a finding of fact must undertake and meet its heavy marshaling burden in its opening memorandum of law on appeal. An appellant cannot hold its sufficiency of the evidence challenge in reserve and wait to marshal the evidence in its reply brief.").

substantial benefits to the Company's customers both in lowering their rates and in replacing declining production from other sources. It established that the costs incurred by Questar Gas to process coal-bed methane in the CO_2 Removal Plant are the same as if Questar Gas owned the plant itself and less than if it were owned by an unaffiliated, third party. Finally, the undisputed evidence established that had the matter gone to hearing, the Division and the Committee would have recommended a result in the range of the result they negotiated in the Stipulation.

In this case, Questar Gas did not simply bring its business decision to the Commission for approval, it made the decision in a public, collaborative process involving regulators and other interested participants. The process was described and reviewed in detail in the verified application filed January 31, 2005 and the sworn testimony filed April 15 and was further briefly reviewed in the live testimony presented without objection on October 20, 2005.

It is not a close call as to whether substantial evidence supports the *2006 Order*. Rather, Petitioners choose to completely ignore that overwhelming evidence and focus instead on a claim that the evidence considered by the Commission was from the wrong timeframe or that it was incompetent. Br. 74-75. Petitioners are wrong on the first claim for all the reasons set forth in the discussion of res judicata above. The Commission considered the evidence from the appropriate timeframe in addressing what a prudent utility would do *now* in response to the increasing production of coal-bed methane throughout the state, the region, and the nation. Petitioners are wrong on the second claim for the reasons discussed below.

2. The Evidence Was Competent, and Petitioners' Objection Is Too Late.

Petitioners' Brief makes the sweeping assertion that "every scrap" of evidence in the record was hearsay. Br. 53. But Petitioners do not support any claim that the evidence was all hearsay under evidentiary standards (to the extent those standards apply to the Commission's legislative ratemaking function). Petitioners cannot, for example, legitimately fault as "hearsay" the verified application or the sworn, written testimony of obviously qualified experts or the fact testimony of most of the same witnesses based on their personal knowledge and observation that was the basis for their opinions.[48] Nor can Petitioners assert that the experts did not reasonably rely on facts of a type reasonably relied on by experts in their particular fields. *See* Utah R. Evid. 703.

Indeed, Petitioners do not even attempt to undermine the Company's verified application or the sworn written testimony and exhibits. Instead, they inaccurately assert that pre-filed testimony is insufficient to meet a utility's burden of persuasion, citing the statement from *Utah Dept. of Business Regulation v. Public Serv. Comm'n*, 614 P.2d 1242, 1245-46 (Utah 1980), that "[t]he company must support its application by way of substantial evidence, and the mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the burden." Br. 84. But Petitioners' reliance on that

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[48] The witnesses were Barrie L. McKay, M.A., a Certified Public Accountant and Manager of Regulatory Affairs for Questar Gas (R. 237); Lawrence Conti, an engineer and General Manager of Operations and Gas Control for Questar Pipeline (R. 248); Robert A. Lamarre, a petroleum geologist who was the chief geologist on the Ferron coal-bed methane gas field (R. 281); Alan J. Walker, Manager of Gas Supply for Questar Gas (R. 283 at 3-4); Robert O. Reid, Ph.D., economist specializing in modeling natural gas price differentials, including in the Rocky Mountain region (R. 297 at 3-7); and Charles Benson, M.E., an engineer specializing in gas quality standards and interchangeability. R. 306.

case is misplaced. This was a case where the utility submitted overwhelming, credible, uncontradicted evidence that the Commission was not free to ignore. *See, e.g., U S WEST Communications, Inc. v. Public Serv. Comm'n*, 901 P.2d 270, 275 (Utah 1995) (*quoting Jones v. California Packing Corp.*, 244 P.2d 640, 644 (Utah 1952) ("The law does not invest the Commission with any such arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence . . . .").[49]

Petitioners attack the live testimony presented in the hearing on October 20, 2005 as unqualified, policy testimony and hearsay. Br. 85. However, Petitioners do not bother to say specifically why the testimony was unqualified or hearsay. The fact is that each witness who provided testimony on October 20 was a person with extensive experience in public utility regulation and who has presented expert testimony before the Commission on many occasions.[50] Each was fully competent to testify to the background and purposes of the Stipulation and the negotiations that led to the Stipulation. Each participated in the negotiations and in the discovery and analyses of the facts underlying the positions of the parties. Each participated in the technical conferences. Mr. McKay, the Questar Gas witness, had personal knowledge through his work for the Company of

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[49] The general practice before the Commission is to file direct, rebuttal and surrebuttal testimony and exhibits prior to a hearing. At the hearing, witnesses make any necessary corrections to their filed testimony and then usually present a brief summary. They are then subjected to cross examination. However, the vast bulk of the evidence is presented through the pre-filed testimony. If Petitioners' argument were correct, almost no order of the Commission would be sustainable because almost all findings are deeply rooted in the pre-filed testimony and exhibits.

[50] The testimony was presented by Mr. McKay for Questar Gas (*see* footnote 48 *supra*); William A. Powell, Ph.D., economist and Acting Manager of the Energy Section for the Division; and Dan Gimble, Chief of Technical Staff for the Committee. R. 2297.

many of the facts underlying the technical conferences, the verified application, the sworn testimony, the discovery process and the negotiations. Dr. Powell and Mr. Gimble, longtime employees of the Division and Committee, respectively, were well aware of the internal analyses of these parties and their outside experts and of the positions the parties planned to take if the matter had proceeded to hearing. There is simply no basis for Petitioners' claim that this evidence was unqualified or hearsay.

Furthermore, Petitioners' claims regarding the evidence are untimely. Hearsay objections must be preserved at the time the evidence is offered, not months later in a petition for reconsideration. *Barson v. E.R. Squibb & Sons*, 682 P.2d 832, 837 (Utah 1984)("Where there was no clear and definite objection on the basis of hearsay, that theory cannot now be raised on appeal."). By choosing not to participate in the case earlier and by not objecting to admission of the evidence on October 20, 2005, Petitioners waived any such objection.[51]

In summary, there was an enormous amount of competent evidence in this case, and the witnesses relied on first-hand knowledge of the factual bases underlying their

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[51] Petitioners' claims are also misplaced because this Court has "repeatedly held that the hearsay rule does not apply in administrative hearings. An administrative agency must be guided by fairness in determining what evidence to accept and what to hold inadmissible. All that is necessary is that admitted evidence have some probative weight and reliability." *Bunnell v. Industrial Comm'n*, 740 P.2d 1331, 1333 (Utah 1987) (citations omitted). Thus, the Commission is allowed to receive and rely on hearsay or incompetent evidence, but may not base a finding solely on such evidence. *See* Utah Admin. Code R746-100-10.F.1. *See also Lake Shore Motor Coach Lines, Inc. v. Welling*, 339 P.2d 1011, 1013-14 (Utah 1959) ("It is to be remembered that there is considerable difference between court trials and proceedings before administrative agencies. It is undisputable that the legislature intended that the latter should not be burdened with undue formality.").

opinions or on facts of a type reasonably relied upon by experts in the particular fields at issue. The Commission's reliance on such testimony was completely appropriate and consistent with its rules and past practice.

Lacking the capability to demonstrate that the evidence was incompetent or hearsay, Petitioners attempt to misdirect the Court yet again by claiming that "[m]uch if not most of the evidence upon which the Commission relied in issuing the January *2006 Order* was 'introduced' during discussion sessions, so-called 'technical conferences.'" Br. 82. In making this argument, however, Petitioners fail to acknowledge or dispute the Commission's statement in the *2006 Order* that

> we base our findings and conclusions contained herein upon a thorough examination of the entire evidentiary record in these dockets and conclude that, absent any reliance on the noticed material [from the technical conferences], the overwhelming weight of evidence admitted in these proceedings, including testimony on the Stipulation, pre-filed testimony, and the facts asserted in the application, support both our conclusion that Questar Gas has acted prudently in evaluating and choosing among the available alternatives and our approval of the Stipulation.

R. 1144 at 32 fn 18. In light of this clear statement, Petitioners' arguments about technical conferences are irrelevant. The Commission did not rely on the technical conferences in support of its findings or decision. Nonetheless, Questar Gas will demonstrate that Petitioners' arguments are also incorrect in section VI.F.1, below.

D. <u>The Commission Satisfied Due Process.</u>

Petitioners' Brief seeks to create a parade of horrors about how "dismal" the Commission's procedure was in this case in an effort to persuade the Court that the Commission should have ignored 15 months of proceedings and work and started over

when Mr. Ball and Ms. Geddes submitted their untimely and unfounded complaints after the case was submitted and the Commission was in deliberations. Petitioners' attempt is deficient for several reasons. Petitioners' notice and due process claims suffer from the same defect that is fatal to the rest of their claims—Petitioners lack standing to assert their arguments because they chose not to intervene as parties in a proceeding they acknowledged they knew about. They do not qualify to seek reconsideration under section 54-7-15. Thus, there is no basis for them to be heard. Petitioners' notice and due process claims suffer from an additional defect, however, in that Petitioners have failed to allege any prejudice to themselves arising from the procedural problems they assert. Finally, the Commission followed appropriate procedures as specified in statutes and rules and complied with all requirements of due process. Petitioners' due process arguments are simply incorrect.

1. Petitioners Must Take the Case as They Found It and Have Not Alleged Any Prejudice from the Alleged Procedural Errors.

Petitioners' procedural arguments consist of nitpicking through the record after the fact looking for any potential technical procedural problem to attack, rather than substantive arguments that any of the Petitioners was actually harmed by any alleged procedural defect.[52] But Petitioners are not entitled to make such generalized and

[52] Petitioners claim that the Commission's "docketing system is a shambles" (Br. 89), without ever asserting that any of them actually tried to use it; that its "website is confusing and difficult to navigate" (*id.*), without ever alleging that any of them tried to navigate it; and that the notice provided of the hearing in this matter was insufficient (*id.* 86), without ever saying that any of them (other than Mr. Ball and Ms. Geddes—whose own notice arguments are baseless because of their admitted familiarity with the

untimely procedural attacks. "When intervention is permitted, the intervenor must accept the pending action as he finds it; his right to litigate is only as broad as that of the other parties to the action." *Lima v. Chambers*, 657 P.2d 279, 284-85 (Utah 1982) (citation omitted). This means that Petitioners "must join subject to the proceedings that have occurred prior to [their] intervention; [they] cannot unring the bell." *See* 7C Charles Alan Wright, et al., *Federal Practice and Procedure* § 1920 (2d ed. 1986) (*quoting Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153 (S.D. Cal. 1954)).[53]

The rules requiring a later participant to take the case as he or she finds it and not "unring the bell" are all the more important to enforce in a case such as this where the late participation by Petitioners was driven by Mr. Ball and Ms. Geddes, who apparently sought customer and alleged shareholder names to use in opposition to the Stipulation in an attempt to find a loophole (through Utah Code Ann. § 54-7-15) around their own failure to seek timely intervention.[54] Petitioners have absolutely no basis to complain about the notice or process provided in this matter.

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proceeding) would have sought to attend the hearing had the notice not allegedly been deficient.

[53] *See also Paradise v. Prescott*, 585 F.Supp. 72, 76 n. 4 (M.D. Ala. 1983) (intervenors "not allowed to challenge prior orders, judgments, and decrees"); *Galbreath v. Metro. Trust Co. of Cal.*, 134 F.2d 569, 570 (10th Cir. 1943) (intervenor "bound by all prior orders and adjudications of fact and law as though he had been a party from the commencement of the suit.")

[54] *See* Addendum 5 at 14-23 for discussion of shareholder entitlement to seek reconsideration.

2. The Commission's Notice Satisfied Due Process.

Notice of the hearing in this matter was provided on October 11, 2005, nine days in advance of the hearing date. Commission Rule R746-100-10.A specifies that the Commission will normally give notice at least five days in advance of a hearing unless a shorter period is deemed reasonable by the Commission. Further, no hearing is required at all when all parties to the proceeding are in agreement with a settlement. *See* Utah Code Ann. § 54-7-1(3)(e)(ii). *All parties* had reached a settlement in this matter. Thus, the Commission went above and beyond the notice requirements of its rules and its statutory notice responsibility under section 54-7-1 by giving nine days notice. The Commission was clearly correct, therefore, to conclude that its notice was sufficient.

Moreover, Petitioners should not be permitted to raise procedural objections when they failed to avail themselves of the opportunity to participate throughout the course of the proceedings.[55] Petitioners complain that nine days of notice was insufficient to allow an interested person to participate in the hearing of this matter; but their complaint puts too much weight on the last procedural notice issued by the Commission. There was ample notice prior to that time of the matters at issue in this case, and a truly interested person would not have waited until the very last minute (when the hearing on the Stipulation was noticed and just a few weeks before the hearing on the merits was scheduled) to seek to participate.

When the initial scheduling order was issued in this matter, on March 28, 2005, the Company's complete verified application seeking recovery of CO_2 removal costs had

[55] *See Lima*, 657 P.2d at 284-85.

been on public file for nearly two months.[56] The Commission stated in the *2004 Order* that it would consider the long-term issue of how to address coal-bed methane in a separate docket and in the *Clarification Order* that Questar Gas was free to seek rate recovery for CO_2 removal in other dockets.

It is disingenuous, therefore, for Petitioners to argue that an interested person reading such language from the Commission's *Clarification Order* would assume that the *2004 Order* had resolved the question of rate recovery for CO_2 removal costs once and for all. Rather, an interested person would have had many months prior to the hearing in this matter to ascertain that rate recovery for ongoing CO_2 removal costs was not foreclosed, and that Questar Gas was in fact seeking such recovery. Those facts alone would have put an interested person on inquiry notice to familiarize himself or herself with this case and determine whether he or she wanted to participate.

Furthermore, Petitioners' claims are disingenuous in light of Mr. Ball's participation throughout the course of these proceedings in his role as director of the Committee's staff, including the Committee's participation in settlement discussions before the Company even filed its verified application in the consolidated docket. It was not the filing of the Stipulation that suddenly put rate recovery concretely at issue in this case, it was the filing of the Company's verified application on January 31, 2005 (and applications in earlier dockets) and its filing of sworn testimony on April 15, 2005.

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[56] And it had been public information for 10 months (since the Company's petition in Docket No. 04-057-04) or at least six months (since the Company's petition for reconsideration and the Commission's *Clarification Order*, following the *2004 Order*) that Questar Gas would be seeking recovery for ongoing CO_2 removal costs.

Petitioners' argument that the Stipulation was "altered and redrawn completely" and "fashioned [] an entirely new compromise" (Br. 91), is also disingenuous. The verified application and sworn written testimony clearly sought recovery of CO_2 removal costs.

Petitioners' notice and process arguments are merely attempts at after-the-fact scrutiny of procedural details that caused them no injury. Mr. Ball's and Ms. Geddes' attempt to redo a 15-month proceeding that they previously chose not to participate in arose only after an outcome they did not like. If would-be intervenors do not take the case as they find it, the ability of a non-party to seek reconsideration under section 54-7-15 will lead to a procedural nightmare. R. 1150 at 8, 14. Nothing in section 54-7-15 can appropriately be read as allowing Petitioners to completely unwind the Commission's proceedings in the manner they seek to accomplish.

3. Chairman Campbell Was Not Required to Recuse Himself, and Petitioners Failed to Raise the Recusal Argument in a Timely Manner.

Chairman Campbell's participation in this case was completely appropriate. Chairman Campbell's tenure as director of the Division ended nearly five years prior to the entry of the *2006 Order*. The *2004 Order* concluding the 1999 general rate case, in which Chairman Campbell participated for the Division, was not appealed and that case became forever final and unappealable thirty days after the Commission issued the *Clarification Order*. *See* Utah Code Ann. § 63-46b-14(3)(a). That case was concluded prior to the beginning of this case and no aspect of this case revisited the determinations made in the *2004 Order*.

Upon its rejection by the *2004 Order*, the CO_2 Stipulation, entered by the Division while Chairman Campbell was director, also ceased to have any force or effect. Thus, there was nothing whatsoever remaining from Chairman Campbell's participation, as Division director, in the 1999 rate case. This was simply not the same case, nor a related case, to the 1999 proceeding. Despite Petitioners' unceasing attempts to stop the clock in 1999 on all things related to coal-bed methane, neither Chairman Campbell's participation nor the partial rate recovery provided by the *2006 Order* in this case had any pollution in them from Petitioners' proverbial well. Br. 63.

Moreover, Chairman Campbell's participation in this matter was one of the issues that Petitioners were required to take as they found it. Mr. Ball and Ms. Geddes certainly knew about Chairman Campbell's participation in the case. So would any person, for example, who attended the scheduling conference or any of the six technical conferences in Docket No. 04-057-09 or who attended the scheduling conference in the consolidated docket or read the Commission's scheduling order issued March 28, 2005, setting the schedule for proceedings on the Company's verified application (including the original notice of hearing, set for October 6, 2005). As Petitioners' acknowledge they are aware (Br. 53, 94), Chairman Campbell participated actively in the technical conferences and signed the scheduling order. R. 83. He actively participated throughout the Commission proceeding. There was nothing improper about that participation; and, in any event, it was too late for Petitioners to complain about it when they did. *See, e.g., Madsen v. Prudential Fed. Sav. & Loan Assn.*, 767 P.2d 538, 542-43 (Utah 1988). The Commission could not efficiently manage its dockets if a non-party could come in after a

final order has been issued and criticize such matters, when it is too late to change the past and any corrective measures would involve starting the entire case over. Due process cannot conceivably impose such a requirement in circumstances such as the present case.

E. The Commission Appropriately Approved the Stipulation.

Petitioners argue that the Commission did not comply with section 54-7-1 because affiliate transaction are barred by section 54-4-26 and the contract for CO_2 processing required prior approval under the 1994 Planning Guidelines. These arguments lack merit.

1. Affiliate Transactions Are Not Barred by Utah Code Ann. § 54-4-26, and the 1994 Planning Guidelines Do Not Require Pre-approval of the Contract for CO_2 Removal.

Petitioners make the claim that affiliate transactions are barred by section 54-4-26 of the Utah Code. Br. 13-14, 75-78. Petitioners also claim that Questar Gas violated the 1994 Planning Guidelines[57] by failing to submit its contract with Questar Transportation for pre-approval. *Id.* These claims lack merit.

The Commission has regularly approved expenses incurred in contracts with affiliates as just and reasonable for recovery in rates and this Court has regularly upheld such orders. *See, e.g., Wexpro II*, 658 P.2d at 604, 607, 616. The only requirement

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[57] The 1994 Planning Guidelines arose out of an integrated resource planning process initiated in Docket No. 89-057-15. Pursuant to that process, Questar Gas submitted its first integrated resource plan ("IRP") on September 30, 1991. The 1994 Planning Guidelines were issued on September 26, 1994. They provided that the Company would submit new IRPs every other year (erroneously referred to as "biennially" in the guidelines) and that it would submit an update to the new IRPs in off years. They establish an informal, non-adjudicatory planning process which is nothing like the process assumed by Petitioners in their Brief.

applicable to recovery of such expenses in addition to those applicable to any other expense is that affiliate expenses are subject to a higher level of scrutiny than are expenses incurred under contracts with unrelated third parties. *See, e.g., U S West Communications*, 901 P.2d at 274. If affiliate transactions are barred by section 54-4-26, there is no need to subject them to any scrutiny, let alone higher scrutiny.

Petitioners' argument is contrary to the language of section 54-4-26, which provides:

> Every public utility **when ordered by the commission** shall, before entering into any contract for construction work or for the purchase of new facilities or with respect to any other expenditures, submit such proposed contract, purchase or other expenditure to the commission for its approval; and, if the commission finds that any such proposed contract, purchase or other expenditure diverts, directly or indirectly, the funds of such public utility to any of its officers or stockholders or to any corporation in which they are interested, or is not proposed in good faith for the economic benefit of such public utility, the commission shall withhold its approval of such contract, purchase or other expenditure, and may order other contracts, purchases or expenditures in lieu thereof for the legitimate purposes and economic welfare of such public utility.[58]

Petitioners' Brief ignores the operative words in the statute "when ordered by the [C]ommission." A public utility is only required to submit a contract to the Commission for pre-approval when the Commission has ordered it to do so. The policy behind this qualification is sound. Public utilities enter into hundreds, if not thousands, of business arrangements each year. If the Commission were required to review and pre-approve each of them, the utility could not operate efficiently nor could the Commission.

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[58] Utah Code Ann. § 54-4-26 (emphasis added).

Furthermore, if the Commission were required to pre-approve every utility expenditure, it would improperly intrude upon the role of utility management contrary to well-established principles of law. *See Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 289 (1923) ("'The Commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation . . . .'") (quotation omitted); *Wexpro II*, 658 P.2d at 618 (Utah 1983) ("the Commission is normally forbidden from intruding into the management of a utility") (*citing Logan City v. Public Util. Comm'n*, 296 P. 1006, 1008 (Utah 1931)). There is simply no bar against affiliate transactions in section 54-4-26 or elsewhere, and Petitioners implicitly recognize this in citing the standard for higher scrutiny and approval of affiliate transactions in their Brief. Br. 18.

Petitioners discuss and misconstrue the 1994 Planning Guidelines extensively (*e.g.*, Br. 22-25, 32-35) and argue that they required Questar Gas to submit its contract with Questar Transportation for pre-approval. Br. 76. The only portion of the guidelines cited by Petitioners' in support of this argument is a statement regarding ongoing concerns about the possibility that affiliate relationships might constrain acquisition decisions. That statement is:

> Affiliate relations remain a concern of this Commission. We do not presume that affiliate transactions are biased and not in the customers' best interests. However, the Commission puts the Company on notice that with regard to cost recovery of [the Company's] expenditures, we will view [the Company's] customers' interests as primary. Such interests shall not be subordinated to those of the corporate affiliates. All planning options that potentially

> benefit [the Company's] ratepayers shall be investigated, whether or not they benefit subsidiaries of the Questar Corporation.[59]

Petitioners then make the incredible leap to assert that this statement of Commission concern about affiliate issues equates to an order that all contracts with affiliates must be submitted for pre-approval. Br. 77. The Commission's language said no such thing.[60] Rather the Commission acknowledged that there was no presumption against affiliate transactions, but indicated that it would closely scrutinize them.

Petitioners' argument also ignores the fact that the Commission scrutinized affiliated transactions in this case and found:

> The record also establishes that having the CO_2 Removal Plant owned and operated by Questar Transportation does not result in any prejudice to Questar Gas or its customers. The costs incurred by Questar Gas are the same as if the plant were owned and operated by Questar Gas. The provisions in the Stipulation . . . assure that the interests of Questar Gas's customers are given priority in this arrangement.
>
> . . . .
>
> While any activity involving a Questar Gas affiliate raises legitimate affiliate interest concerns, it is clear that it is the continuing integration of the nation's natural gas pipeline system, not affiliate interests, that is driving the increasing volumes of coal bed methane on the Questar Pipeline and Questar Gas systems. It is equally clear that safety, efficiency, and cost considerations, not affiliate interests, led Parties to conclude that

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[59] 1994 Planning Guidelines at 3. *See* Br. Addendum 3.

[60] Petitioners' argument on the 1994 Planning Guidelines, if they were adjudicative as represented by Petitioners (which they are not) would be an improper collateral attack on the IRP process. Petitioners' argument essentially amounts to a claim that Questar Gas and apparently the regulators have not complied with their obligations under the 1994 Planning Guidelines. There is no factual basis for this claim, and such a collateral attack would be prohibited. *See* Utah Code Ann. § 54-7-14.

> the operation of the CO_2 Removal Plant is the preferred course of action during the stipulated transition period.

R. 1144 at 34-35, 37.

Petitioners conclude this portion of their Brief by arguing that contracting with Questar Transportation is, by definition, diverting funds from Questar Gas to an affiliate contrary to section 54-4-26. Br. 77-78. As noted above, the Commission already considered whether the CO_2 removal arrangement was contrary to the interests of customers and concluded that it was not. If there were any requirement to be met under the 1994 Planning Guidelines, and there is not, this finding by the Commission shows compliance by Questar Gas. The questions raised in the *2004 Order* about the contract in effect in 1998 were fully explored and answered by the evidence in this docket regarding the current arrangement from February 2005 going forward. There is no diversion of funds, only rate recovery for a portion of CO_2 removal costs, which recovery is expressly limited and does not offer any opportunity for diversion of funds. As noted above, the Commission made specific findings on Questar Gas receiving processing services from an affiliate and concluded that Questar Gas had put its customers' interests before those of its affiliate. R. 1144 at 37-38.

2. The Absence of the Contract with Questar Transportation Was Inconsequential.

Petitioners complain that the contract between Questar Gas and Questar Transportation was not on the record in the dockets on appeal. Br. 77. While Petitioners are correct in this observation, the absence of the contract has no bearing on approval of

the Stipulation.[61] The Stipulation provides the terms and conditions upon which Questar Gas will receive rate recovery for CO_2 removal costs. It does not matter what the prior arrangement between Questar Gas and Questar Transportation provided, nor does it matter what the current arrangement will be; Questar Gas will only receive rate recovery in accordance with the terms of the Stipulation and the Commission will retain jurisdiction over Questar Gas and its rates to ensure that this takes place. *See* Utah Code Ann. § 54-4-4. There was no requirement that the contract be submitted for approval and no need to have it in the record.

3. The Commission Met the Requirements for Approval of Settlements.

Petitioners make an unclear argument that the Commission did not comply with the requirements for approval of settlements in section 54-7-1. Br. 78-97. Specifically, Petitioners cite the requirements that the Commission must find that settlement is the appropriate way to resolve the case and that the Commission must consider the significant and material facts related to the case. Br. 78.

This argument is difficult to understand in light of the *2006 Order*. The *2006 Order* clearly found that the settlement was just and reasonable in result and that the evidence in the record supported such a finding. R. 1144 at 38. The Commission deliberated two and one-half months before issuing the carefully reasoned and considered

[61] This case is not about the contract for CO_2 removal services, nor is it about reviewing whether Questar Transportation was prudent in building the a CO_2 Removal Plant. It is simply about whether Questar Gas can recover costs it incurs for CO_2 removal.

2006 Order. There is no basis to assume that the Commission did not consider whether settlement was an appropriate means to resolve the case.

Given the placement of this argument in the Brief, Petitioners apparently are arguing, similar to the foregoing arguments, that the Commission did not appropriately consider affiliate interests in approving the Stipulation. However, the *2006 Order* did address affiliate interest issues. R. 1144 at 28-29, 37-38. Therefore, the argument has no merit on its face.

Petitioners' Brief also faults the Commission for failing to follow the requirements of section 54-7-1 to consider all "significant" and "material facts" by not considering the supposed conflict that exists between having appliance inspection and adjustment completed quickly, on the one hand, and receiving rate coverage for CO_2 removal, on the other hand. Br.80-81. Petitioners' principal complaint is that the Commission noted in the *2004 Order* that the original projection for completion of appliance inspection and adjustment was four years, and that, according to Petitioners, "[i]f this strategy had been followed, when proposed by the Utility in 1998, the appliance adjustment program would have been completed in 2002." *Id.* 80. The fact the Petitioners conveniently ignore is that the four-year expedited appliance adjustment program would have cost customers over $100 million, much more than CO_2 removal for the transition period.

Petitioners cite a question raised in the *2004 Order* that affiliate interests might cause the Company to delay the completion of the appliance inspection and adjustment in order to obtain further revenues from the CO_2 Removal Plant. What Petitioners fail to

note, however, is that when Questar Gas sought clarification on the Commission's meaning regarding this point, the Commission stated that:

> The language used in our Order's discussion was used as part of our expression of the regulatory concern of how affiliate interests and corporate relationships can present conflicts to the interests of a utility and its customers. . . . **[O]ur Order is not intended to make specific findings that Questar actually took specific, calculated steps to delay customer actions with regard to their appliances, to the detriment of customer interests and to the benefit of corporate interests.** Our difficulty was in finding substantial evidence that Questar recognized and addressed the conflicts presented by the developing circumstances and that Questar's actions were not unduly influenced by affiliate interests as it took the steps it did and did not consider and follow.

Clarification Order at 3 (emphasis added).

In light of the Commission's clarifying statement, there is no support for Petitioners' assertion that the Commission found Questar Gas to have intentionally delayed the implementation of the appliance inspection and adjustment program. Further, as demonstrated previously, there is no basis for Petitioners' claim that the Commission failed to address affiliate issues in the context of the operation of the CO_2 Removal Plant. Br. 79. Finally, there is no basis for any inference that Questar Gas has done anything to delay the implementation of the Green Sticker Program. To the contrary, the Company has pursued it vigorously through contractor training, press releases, billing inserts and other promotional activities that began in 1998.

The Commission clearly considered all "significant" and "material facts" and based its findings on the need for a just and reasonable result as required by section 54-7-

1. Petitioners' claims that the Commission failed to follow the requirements of section 54-7-1 are baseless.

F. Petitioners' Other Arguments Are Irrelevant and Unpersuasive

Petitioners make several additional arguments that are not relevant to the issues before the Court and that are unpersuasive. Questar Gas will not attempt to address each of these arguments made in Petitioners' 100-page Brief. However, it will briefly demonstrate that two of the more egregious arguments are incorrect.

1. Technical Conferences Are Appropriate Vehicles for the Commission's Investigative and Legislative Ratemaking Functions.

Petitioners complain that technical conferences are deficient vehicles for exploring issues in an administrative proceeding, and that the Commission may not rely on anything it learned through such conferences in this case. Br. 82-84. This argument is irrelevant because the Commission expressly did not rely on information from the technical conferences. R. 1144 at 32 fn 18. But even if the Commission had relied on the information, Petitioners fail to grasp the Commission's investigative and legislative ratemaking functions, which the Commission appropriately exercised in this case. Technical conferences are, among other things, publicly-noticed meetings that allow the Commission and interested persons to investigate a utility's actions and to ensure that the utility is fulfilling its responsibilities to provide safe and adequate service at just and reasonable rates. They are an often-used and effective method for the Commission to fulfill its legislative and investigative functions, and they were appropriately used in this case.

The principal value of the information from the technical conferences, which was included in the verified application and the sworn testimony, was in helping the Commission to evaluate the thoroughness and documentation of the decision-making process, the interests of the public and parties, any affiliate conflict issues that might be present, and the acceptability of the Stipulation in light of the settlement requirements of section 54-7-1. All of these things go toward the Commission's legislative ratemaking function, and there would have been nothing improper about the Commission considering the technical conferences in this context even absent the application or testimony.

Further, much of Petitioners' attack is focused on the assertion that the technical conferences were held in a separate docket.[62] In fact, the technical conferences were from the same consolidated docket in which the *2006 Order* was issued (and in which the Stipulation was filed) that is now on appeal, and in any event Petitioners' view of the state of the law with regard to the Commission taking administrative notice is simply wrong.[63]

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[62] Br. 82. Petitioners' cite *Los Angeles & S.L.R. Co. v. Public Util. Comm'n,* 17 P.2d 287 (Utah 1932),. That case is distinguishable because in it the Commission based its decision in one case on matters from an entirely different case without formally taking notice of the evidence and allowing the parties an opportunity to address it. The Commission took notice of the information here in a public hearing at which parties could address the information, and the information was from the same consolidated case.

[63] Petitioners wrongly claim that under Utah Code Ann. § 63-46b-8(b), the Commission may only take administrative notice of "facts in a record from other proceedings where those facts could be judicially noticed under the Utah Rules of Evidence." Br. 82. (citation and internal quotation marks omitted). This is an obvious misreading of the statute, however, which actually states: "(b) On his own motion or upon objection by a party, the presiding officer . . . (iv) may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of technical or scientific facts within the

2. The "Cheap Gas Exception" Argument Reveals Petitioners' Lack of Understanding of Prudence and Overreaching Position.

Petitioners acknowledge the savings to Questar Gas customers that come from coal-bed methane, but dismiss them on the claim that this is not the issue. They say that Questar Gas has a duty to provide gas to its customers at the lowest reasonable cost. They conclude by saying that the fact that coal-bed methane provides cheap gas does not create an exception to prudence. They call this the "cheap gas" exception.[64]

Petitioners' argument is revealing. It does not appear to matter to Petitioners that customers pay substantially less for gas and processing combined today, than they would for natural gas absent the availability of coal-bed methane. They are willing to ignore this benefit because of their belief that the benefit has been tainted by affiliated interest conflicts. It does not matter to them that the Commission concluded in the *2006 Order* that there was no improper affiliate influence in the decision making for the period in question.

This argument reveals two things. First, Petitioners do not understand prudence. If a utility provides safe, reliable and adequate service at just and reasonable rates, it is prudent. It does not matter whether an affiliate is involved. To be sure, the Commission must carefully examine the affiliate interest to assure that it has not improperly

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agency's specialized knowledge." Utah Code Ann. § 63-46b-3(1)(b)(iv). Thus, while Petitioners improperly argue that the three identified aspects of notice must all be satisfied for notice to be appropriate, in fact the subsection identifies three independent grounds for taking administrative notice, one of which is "the record of other proceedings before the agency."

[64] Br. 68-69. This is obviously an attempt to link to the Court's *2003 Decision* saying there was not a safety exception to prudence.

influenced the decision in a manner that has impaired service or increased costs, but the mere existence of an affiliate interest does not transform a prudent action into an imprudent one.

Second, the argument reveals the overreaching and inequitable nature of Petitioners' position. Petitioners are happy to have cheap gas, but they are not willing to pay the costs required to make the cheap gas safe. The right of a utility to recover its reasonable costs of providing service is a fundamental premise of utility regulation. *See, e.g., Stewart v. Utah Public Serv. Comm'n,* 885 P.2d 759, 767 (Utah 1994) (the law "mandates that rates produce enough revenue to pay a utility's operating expenses plus a reasonable return on capital invested . . .").

The Commission has found based on substantial evidence the Questar Gas has acted prudently today in providing coal-bed methane to its customers and in processing that gas during a transition period to remove CO_2. This is not an exception to prudence; it is prudence.

VII. CONCLUSION

For the foregoing reasons, this Court should dismiss Petitioners' appeal or affirm the Commission's *2006 Order*. The Court is without jurisdiction to consider the appeal because Petitioners lacked standing to seek rehearing or reconsideration of the *2006 Order*, a jurisdictional prerequisite or failed to preserve any standing they had. Even if they had standing, the *2006 Order* was in accordance with law and substantial evidence supported the Commission's finding that Questar Gas was prudent in continuing to purchase and process coal-bed methane to the benefit of its customers and that the

resulting rates are just and reasonable. The Court should deny Petitioners' request for attorneys' fees. Their claims are without merit.

RESPECTFULLY SUBMITTED: December 5, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **BRIEF OF RESPONDENT QUESTAR GAS COMPANY** to be delivered by hand to the following on December 5, 2006:

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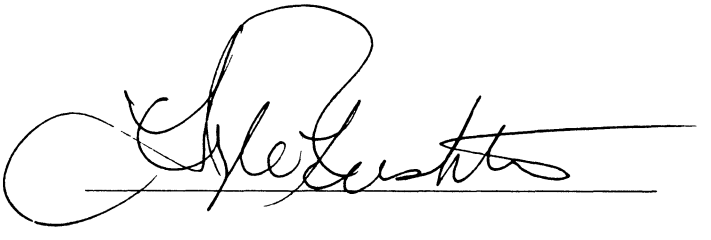

ADDENDUM INDEX

1. Determinative Provisions

2. Report and Order, Docket No.04-057-04, 04-057-11, 04-057-13, 04-057-09, 05-057-01 (Utah PSC Jan. 6, 2006)

3. Order on Request to Intervene, Docket No.04-057-04, 04-057-11, 04-057-13, 04-057-09, 05-057-01 (Utah PSC Jan. 6, 2006)

4. Statement in Support of Intervenor Status for Claire Geddes and Roger J. Ball [Sample - John Dewey and Loretta Huston]

5. Memorandum in Support of Motion to Dismiss of Questar Gas Company, Supreme Ct. No. 20060279 [document mislabeled as Case No. 20060280]

6. Memorandum in Support of Motion to Dismiss of Questar Gas Company, Supreme Ct. No. 20060280 [document mislabeled as Case No. 20060279].

7. Order, Docket Nos. 98-057-12, 99-057-20, 01-057-14 and 57-05 (Utah PSC Aug. 30, 2004)

8. Order on Request for Reconsideration or Clarification, Docket Nos. 98-057-12, 99-057-20, 01-057-14 and 03-057-05 (Utah PSC Oct. 20, 2004)